Supreme Court, U.S.
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In The

Supreme Court of the United States

EFRAIN CLAUDIO-GOTAY,
EFRAÍN CLAUDIO-ELÍAS, ELIA M. GOTAY-CRUZ,

Petitioners,

v.

BECTON DICKINSON CARIBE, LTD.;
VICTOR PAGÁN, PERSONALLY AND AS GENERAL MANAGER OF BECTON DICKINSON CARIBE, LTD.;
HIRAM OCASIO, PERSONALLY AND AS MANAGER OF BECTON DICKINSON CARIBE, LTD.; JOHN DOE;
JANE ROE; INSURANCE COMPANY X & Y,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the First Circuit erred in ruling that an employee does not engage in a Fair Labor Standards Act protected Activity when he complains about a violation of the overtime payment provisions and refuses to participate in furthering said violation of right on the employees he supervised, and thus he is not entitled to a cause of action against his former employers under said statute's anti-retaliation provisions.

II. Whether the United States Court of Appeals for the First Circuit erred in dismissing the pendant jurisdiction wrongful termination claim late in the district court proceedings when there is still a Federal question claim under the COBRA Act before the Federal District Court related to which pendant jurisdiction should be exercised pertaining to the wrongful discharge claim.

PARTIES

Petitioners:

Efraín Claudio-Gotay, an engineer and law school graduate, employee of Becton Dickinson Caribe, Ltd.

Efraín Claudio-Elías, individual and father of Efraín Claudio-Gotay

Elia M. Gotay-Cruz, individual and mother of Efraín Claudio-Gotay.

Respondents:

Becton Dickinson Caribe, Ltd., a for profit corporation and former employer of Efraín Claudio-Gotay.

Victor Pagán, individual who was at the time of all relevant events the general manager of Becton Dickinson Caribe, Ltd. Juncos Plant where Efraín Claudio-Gotay was employed.

Hiram Ocasio, individual who was at the time of all relevant events Manager of Becton Dickinson Caribe, Ltd. Juncos Plant.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS ENTERED IN THE CASE	1
BASIS FOR JURISDICTION	1
FEDERAL PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	4
ARGUMENTS FOR GRANTING THE WRIT	10
A. The Court Of Appeals' Decision Pertaining To Whether Efraín Claudio-Gotay Engaged In A Fair Labor Standards Act Anti-Retaliation Provision Protected Activity Is In Contravention To The Holdings Of The Tenth And Eighth Circuit Courts' Holdings Upon Which It Is Supposed Be Based	10
B. The Court Of Appeals Erred In Its Decision Pertaining To Dismissal Of The Supplemental Jurisdiction Claims When A Federal Claim Under ERISA, 29 U.S.C. § 1166(a)(2) Is Still Present In The Case And The Case Is At The Latter Stages Of Litigation Pending Only The Celebration Of The Hearing On The Merits Of The Remaining Causes Of Action	19

TABLE OF CONTENTS – Continued

Page

C. The Present Petition Involves A Question Of Law Of Exceptional Importance Upon Which This Supreme Court Has Not Expressed, And If Left Unreviewed, Would Lead To Significant Wrongdoing Upon Employees Who Will Be At The Mercy Of Employers' Will To Impose Upon Them, And As Condition For Employment, That The Employees Engage In Activities Contrary To The Law When Commanded To Do So By The Employers 20

APPENDICES:

Court of Appeals Opinion: *Efraín Claudio-Gotay, et al. v. Becton Dickinson Caribe, Ltd., et al.*, 375 F.3d 99 (1st Cir. July 13, 2004) .....App. 1

District Court Opinion: *Efraín Claudio-Gotay, et al. v. Becton Dickinson Caribe, Ltd., et al.*, Civil No. 01-1085 (SEC) of April 10, 2003.....App. 11

Memorandum from *Efraín Claudio-Gotay* for Distribution at *Beckton Dickinson Caribe, Ltd.* dated January 18, 1999. Pages 301-302 of the Joint Appendix to the U.S. Circuit Court of Appeals.....App. 26

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Blackie v. Maine, 75 F.3d 716 (1st Cir. 1996).....11, 17, 21

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988).....19

Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983).....5, 16

Conners v. Schnuck Markets, Inc., 121 F.3d 1390 (10th Cir. 1997).....13, 15

EEOC v. HBE Corp., 94 F.3d 543 (8th Cir. 1998) ...11, 14, 15

Faulkner v. United Techs. Corp., 240 Conn. 576 (Conn. 1997).....17

Foster v. Time Warner Entm't Co., L.P., 250 F.3d 1189 (8th Cir. 2001).....15, 16

Houlton Citizens' Coalition v. Houlton, 175 F.3d 178 (1st Cir. 1999).....19

Lovejoy-Wilson v. Noco Motor Fuels, Inc., 242 F. Supp. 2d 236 (DNY 2003).....16

McKay v. Town & Country Cadillac, Inc., 2002 U.S. Dist. LEXIS 6748 (D. Ill. 2002).....16

McKenzie v. Renberg's Inc., 94 F.3d 1478 (10th Cir. 1996).....10, 11, 12, 13, 14

McLaughling v. Richland Shoe Co., 486 U.S. 128 (1988).....5

Moyo v. Gomez, 40 F.3d 982 (9th Cir. 1994).....16

Pacheco v. Whiting Farms, Inc., 365 F.3d 199 (10th Cir. 2004).....15

TABLE OF AUTHORITIES – Continued

Page

Reed v. Mohanan's Landscape Co., 2004 U.S. Dist. LEXIS 3283 (D. Ill. 2004) 10

Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168 (1st Cir. 1995) 11, 19

FEDERAL STATUTES

28 U.S.C. § 1254(f) 2

28 U.S.C. § 1367(a) 3, 12

28 U.S.C. § 1367(c) 3, 4, 19

28 U.S.C. § 2101(c) 1

29 U.S.C. § 207 3

29 U.S.C. § 215(a)(3) 2, 10

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 13.3 1

Rule 30.2 1

PUERTO RICO STATUTES

Puerto Rico Law 80 of May 30, 1976, PR Laws Ann. 29 § 185(a) et seq. 8, 9, 10, 11

PR Laws Ann. 31 § 3372 21

PR Laws Ann. 31 § 3421 21

PR Laws Ann. 31 § 3432 21

OPINIONS AND ORDERS ENTERED IN THE CASE

On July 13, 2004, the United States Court of Appeals for the First Circuit issued an opinion on the appeal of *Efraín Claudio-Gotay, et al. v. Becton Dickinson Caribe, Ltd., et al.*, published at 375 F.3d 99 reversing in part and affirming in part the summary judgment entered by the United States District Court for the District of Puerto Rico in the case of *Efraín Claudio-Gotay, et al. v. Becton Dickinson Caribe, Ltd., et al.*, Civil No. 01-1085 (SEC) of April 10, 2003. (Appendix I and II respectively)

BASIS FOR JURISDICTION

This Supreme Court of the United States of America has jurisdiction to entertain this Petition for Writ of Certiorari from the United States Court of Appeals for the First Circuit in the case of *Efraín Claudio-Gotay, et al. v. Becton Dickinson Caribe, Ltd., et al.* No. 03-1752 which decision is dated July 13, 2004. On said decision the United States Court of Appeals for the First Circuit has decided an important question of Federal Law that has not been, but should be, settled by this Court. The opinion issued by the United States Court of Appeals for the First Circuit for which Petition for Writ of Certiorari is filed is also in conflict with opinions issued by other Federal Courts of Appeals. The present petition is timely filed under 28 U.S.C. § 2101(c), Rule 13.3 and 30.2[1] of this Supreme Court of the United States.

[1] Extension of time to file the petition for writ of certiorari until October 31, 2004 was granted by Justice David Souter on October 1, 2004.

This Court has jurisdiction under 28 U.S.C. § 1254(f) to review on Writ of Certiorari the judgment of a Federal Court of Appeals.

FEDERAL PROVISIONS INVOLVED IN THIS CASE

The Fair Labor Standards Act supports the Petitioners' position that the Circuit Court erred in determining that Petitioners did not engage in a protected activity pertaining to said act. In the pertinent portion of the Fair Labor Standards Act it is stated that:

> "it shall be unlawful for any person – . . .
>
> . . . (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3)

Pertaining to the duty of Respondents and its agents to pay overtime wages to the employees, lack of which motivated the Petitioners' internal complaints which motivated the present claims, the Fair Labor Standards Act provides that:

> "(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is

> employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207

Petitioners' claim related to local law under the Puerto Rico statutes should have been maintained by the federal court under its supplemental jurisdiction as the Court of Appeals ruled that Petitioners' claims under the ERISA Act survived Respondents' request for summary judgment. Pertaining to said supplemental jurisdiction federal law establishes that:

> "(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367(a)

Pertaining to the dismissal of the supplemental jurisdiction claims:

> "(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)

STATEMENT OF THE CASE

1. Petitioner Efraín Claudio-Gotay was hired by Becton Dickinson Caribe, Ltd. on September 28, 1998 as Safety/Environmental & Process Engineer. (Appendix 2)

2. After approximately one month in his supervisory duties, Petitioner Claudio-Gotay was assigned the supervision and review for approval of invoices pertaining to the services provided by the security guards of Becton Dickinson Caribe, Ltd. which later he found depicted overtime work billed to be payed to the guards at regular rate. (Appendix 2)

3. These violations to the Fair Labor Standards Act were reported by Claudio-Gotay to Becton Dickinson Caribe, Ltd. through its management due to his belief that the approval and payment of said invoices submitted to him constituted participation in said violation of the Fair Labor Standards Act. (Appendix 2, 12)

4. Security guards for the Becton Dickinson Caribe, Ltd. Juncos Plant were hired through contractor C. M. Express. (Appendix 2)

5. Claudio-Gotay did not approve invoices submitted to him which involved lack of overtime payment to the security guards due to his belief that in doing so, Becton Dickinson Caribe, Ltd. and himself would violate the dispositions of the Fair Labor Standards Act. (Appendix 2, 3)

6. Claudio-Gotay was instructed by Becton Dickinson Caribe, Ltd. through its management, to approve the invoices submitted to him not withstanding that in doing so they would participate in further violations of the Fair Labor Standards Act. Still he did not agree to do so due to his belief that in doing it he would be violating the Fair Labor Standards Act. (Appendix 3, 12)

7. On several occasions Claudio-Gotay complained and stated that the payroll practices of not paying the security guards overtime at the rate established in the Fair Labor Standards Act constituted a violation of said statute and by maintaining said practice Becton Dickinson and himself, if he signed said invoices, would be accomplices to said violations.[2] [3] (Appendix 2, 26)

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[2] Efraín Claudio-Gotay is an engineer and a law school graduate. Based on his education he had the criteria for logically concluding that acts imposed upon him by Becton Dickinson would make him and Becton Dickinson accomplices of said violations of the FLSA.

[3] Claudio-Gotays' opinion is legally confirmed by the decisions in *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983) and *McLaughling v. Richland Shoe Co.*, 486 U.S. 128 (1988) where it is decided that if an employer does not pay enough money to the contractor and due to such lack of adequate payment the contractor does not pay his employees overtime pay, the person who contracts to the contractor is also liable

(Continued on following page)

8. On January 18, 1999 Claudio-Gotay was summoned to a meeting where a telephone conference with Becton's attorney, Manuel Nuñez,[4] would be consulted pertaining to the alleged responsibility of Becton and Claudio-Gotay for the overtime payment violations to the security guards. During said call conference attorney Nuñez indicated that a letter would be sent to CM Express alerting them of their obligation to pay overtime to the guards, that the invoices should be approved and that there would be no responsibility on the part of the now parties in this case. Claudio believed that said position was incorrect and proceeded to file a letter explaining in writing his belief that maintaining said payment and approval of the invoices would constitute participation of the guards rights under the FLSA. (Appendix 3)

9. Claudio-Gotay's letter was handed in on January 18, 1999; Claudio took time off from work and when he returned to Becton Dickinson site on January 22, 1999 found himself locked-out of the company and dismissed without further discussion.[5] (Appendix 26)

10. Claudio-Gotay was terminated from employment on January 22, 1999. (Appendix 12)

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for the FLSA violations. Especially when he shows reckless disregard on whether the conduct is prohibited by the statute.

[4] Attorney Manuel Nuñez is also lead counsel for Becton Dickinson in this case and was the arguing attorney for defendants during the Court of Appeals oral arguments.

[5] The order in which these historic events occurred was reversed in the Court of Appeals' opinion of July 13, 2004. The effect of that mixup in the factual statement is that incorrect facts are analyzed by the Court of Appeals in support of their opinion and dismissal of the FLSA and law 80 claims.

11. No disciplinary proceedings or wārnings were ever addressed to Claudio-Gotay while he was employed by Becton Dickinson Caribe, Ltd.

12. No continued medical coverage benefits notification was given to Claudio-Gotay. Although Respondent Becton Dickinson Caribe, Ltd. alleges to have mailed by certified mail a notification to Claudio-Gotay, they had reason to belief that said alleged notification had not been delivered to Claudio-Gotay and made no attempts to correct said lack of notification. (Appendix 8)

13. Claudio-Gotay was dismissed from employment at Becton Dickinson Caribe, Ltd. due to his reporting of the violations of the Fair Labor Standards Act and his lack of participation in said illicit activity. (Appendix 26, 27)

14. In furtherance of the retaliation against Claudio-Gotay no timely notification of his right to continued medical coverage (as required by COBRA, 29 U.S.C. § 1161) was given to him by Becton Dickinson until March 18, 1999.[6] Furthermore, even after Claudio-Gotay opted for continued medical coverage and payed Becton Dickinson for it, his medical insurance was not reactivated until June 16, 1999. Reactivation occurred because Claudio-Gotay requested reactivation as Becton Dickinson had not instructed the medical insurance carrier to do so. (Appendix 8, 9)

15. Petitioners, Efraín Claudio-Gotay, Efraín Claudio-Elias and Elia M. Gotay-Cruz filed a Complaint under

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[6] As ruled upon by the Court of Appeals in their July 13, 2004 judgment said notification was untimely. *Efraín Claudio-Gotay, et al. v. Beckton Dickinson Caribe, Ltd., et al.*, 375 F.3d 99 (1st Cir. 2004), Appendix 8, 9.

the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. As well as under the Employee Retirement Income Security Act, 29 U.S.C. § 2001, et seq., 28 U.S.C. §§ 1331 & 1343, and Puerto Rico Public Law 80, P. R. Laws Ann. 29 § 185(a), et seq. on January 19, 2001 alleging that Petitioner Claudio-Gotay was dismissed from employment by Respondent Becton Dickinson Caribe, Ltd. due to his reporting of violation of the Fair Labor Standards Act, by said employer, that his dismissal constitutes in itself a violation of the anti-retaliation provision of the Act and an unjustified cause for dismissal, and that Petitioner Claudio-Gotay was not given notice of his right to continued medical coverage within the time period specified to give such notice according to the law. (Docket 1)

16. Petitioners filed Amended Complaint on April 9, 2001 which was answered by the Respondents on April 17, 2001 and July 3, 2001. (Docket 11, 12)

17. On May 31, 2002, after the discovery of evidence was conducted, including taking depositions, Respondents filed a Motion for Summary Judgment, Memorandum of Law in Support Thereof, Statement of Uncontested Facts and Motion to Accept Spanish Language Documents. (Docket 37)

18. On July 24, 2002, Petitioners filed their Opposition to Respondents' Summary Judgment, Request for Summary Judgment in Favor of the Petitioners. Statement of Disputed Material Facts, and Motion to Accept Spanish Language Documents. (Docket 43, 44)

19. On September 18, 2002, Respondents filed a Reply of Opposition to Motion for Summary Judgment. (Docket 49)

20. On March 31, 2003, the District Court issued an Opinion and Order, granted Summary Judgment in favor of Respondents and entered Judgment dismissing, with prejudice, the claims under the Fair Labor Standards Act and Employment Retirement Income Security Act. Claims under Puerto Rico Law 80 were dismissed without prejudice. (Docket 52, 53)

21. On April 30, 2003 Petitioner filed a notice of appeal to the United States Court of Appeals for the First Circuit alleging that summary judgment entered in the case was not warranted as a matter of law pertaining to the Fair Labor Standards Act anti-retaliation provisions claim, the dismissal of the supplemental jurisdiction claim and that there were controversies of material pertaining to COBRA benefit notification to Petitioner Claudio-Gotay which also precluded summary judgment pertaining to said course of action. (Docket 54)

22. Brief for Petitioners was filed on October 27, 2003 along with a joint appendix, and Respondents filed their brief in opposition on December 23, 2003. Oral arguments for the appeal were held in front of a Circuit Court panel comprised by Circuit Judges Torruella, Selya and Coffin on March 1, 2004, after which supplemental letter of citations were filed by Respondents and a response letter by Petitioners. Docket (no docket entry assigned)

23. United States Court of Appeals for the First Circuit entered opinion and order or said on appeal on July 20, 2004. Court ruled that Petitioner Claudio-Gotay did not engage in a protected activity pertaining to the Fair Labor Standards Act anti-retaliation provisions. Affirming that portion of the District Court Summary Judgment, reversing the dismissal of the claim under the

COBRA Act as the record showed there was a material controversy over a timely notification of Petitioners' rights for continued medical coverage, and affirming the dismissal of the wrongful termination claim under Local Law 80. (Docket 58)

24. As Petitioners believe that the Circuit Court of Appeals erred in their dismissal of the Fair Labor Standards Act charge and the wrongful termination charge under Law 80 they respectfully submit their Petition for Writ of Certiorari.

ARGUMENTS FOR GRANTING THE WRIT

A. The Court Of Appeals Decision Pertaining To Whether Efraín Claudio-Gotay Engaged In A Fair Labor Standards Act Anti-Retaliation Provisions Protected Activity Is In Contravention To The Holdings Of The Tenth And Eighth Circuit Courts' Holdings Upon Which It Is Supposed Be Based.

The Fair Labor Standards Act establishes that it is "unlawful for any person to discharge or in any other manner discriminate against any employee[7] because such employee has filed any complaint" . . . pertaining to a violation of the provisions of the Act, 29 U.S.C. § 215(a)(3). The elements for an anti-retaliation claim under the

[7] As Judge Selya commented during oral arguments and as decided in *Reed v. Mohanan's Landscape Co.*, 2004 U.S. Dist. LEXIS 3283 (D. Ill. 2004), the expression "any employee" includes individuals who complains about the violation of rights of another employee and not his own. *Reeds'* decision cites *McKenzie v. Renberg's*, 94 F.3d 1478, 1486 (10th Cir. 1996), in support of said conclusion.

provisions of the Act were established by the Court of Appeals for the First Circuit as: (1) engaging in a protected activity, (2) his employer thereafter subjected him to an adverse employment action, (3) as a reprisal for having engaged in the protected activity. *Blackie v. Maine*, 75 F.3d 716, 722 (1st Cir. 1996). As the Court of Appeals did in the present case, to determine if an individual is entitled to a claim under the anti-retaliation provisions of the Act, a determination on whether the individual engaged in a protected activity has to be made.

In its July 13, 2004 judgment the Court of Appeals for the First Circuit analyzed whether the refusal of Petitioner Claudio-Gotay to follow instructions by his superiors to participate in what he considered a violation of the Fair Labor Standards Act overtime payment violation constituted a protected activity under said statute. After which the Court of Appeals ruled that based on the precedent by the Tenth Circuit Court of Appeals in the case of *McKenzie v. Renberg's Inc.*, *infra*, and its latter analysis by the Eighth Circuit Court of Appeals on *EEOC v. HBE Corp.*, *infra*, said refusal to follow superiors orders does not constitute a protected activity under the Fair Labor Standards Act.

On said judgment the Court of Appeals for the First Circuit also concluded that the verbal and written notifications on Claudio-Gotays' opposition to said violation to the overtime provisions of the Fair Labor Standards Act do not constitute an internal complaint and protected activity under the Act either.

Finally, the Court of Appeals concluded that based on their prior ruling in the case of *Rodriguez v. Doral Mortgage Corp.*, *infra*, the Petitioners' claims of unjust dismissal from employment under local Law 80 was properly

dismissed under the supplemental jurisdiction principle established at 28 U.S.C. § 1367(a) although a federal claim under ERISA 29 U.S.C. § 1166(a)(2) is still present in the case and the case is at the latter stages of litigation pending only the celebration of the hearing on the merits of the remaining causes of action.

The decision of the First Circuit Court of Appeals for the instant case is not only not supported by the jurisprudence of the cited Tenth and Eighth Circuit Courts of Appeals decisions, but based on more recent jurisprudence by those circuit courts, it is in direct contradiction with the law on those jurisdictions.

In an opinion by Judge Ebel of the Court of Appeals for the Tenth Circuit said court ruled that a basic element of the protected activity under the Act is that the employee take some adverse action against the company, and that the employee steps outside his role representing the company, files an action adverse to the employer, actively assists other employees in asserting their FLSA rights, or otherwise engages in activities that reasonably could be perceived as directed towards the assertion of rights protected under the FLSA. *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486 (10th Cir. 1996). In the case of *McKenzie* the employee was the employer's director of personnel whose responsibilities included among others dealing with wage and hours issues, thus the act of informing her employer of issues pertaining to wage and hour was an act in furtherance of her duties through which she did not step aside from her normal responsibilities and thus did not engage in a protected activity concerning the Act.

In the present case the Court of Appeals for the First Circuit holds that in the case of Petitioner Claudio-Gotay

as in *McKenzie*, he did not take any action adverse to his employer and was simply acting in furtherance of his employment duties because said duties included the approval for payment of the security guards invoices. Document which included a description of the hours they worked and that they were to be paid at regular pay rate, not overtime rate, despite that some hours were worked over the 40 hours per week time frame. However the doctrine established in *McKenzie* does not support the conclusion reached by the Court of Appeals for the case of Claudio-Gotay.

Since *McKenzie v. Renberg's Inc, supra*, the Court of Appeals for the Tenth Circuit has clarified and expanded the meaning of said jurisprudence. In a decision also written by judge Ebel, the Tenth Circuit court held that in a case where the Petitioners had no managerial overtime calculation responsibilities the individual requesting overtime payment was taking an action adverse to the company and filing a complaint for the purposes of the Fair Labor Standards Act. *Conners v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997).

In the present case employer Becton Dickinson has admitted that Petitioner Claudio-Gotays' responsibilities did not include overseeing the compliance of Fair Labor Standards Act provisions (Respondents' brief to the Court of Appeals page 10), and that his responsibilities towards the approval of the security guards invoices was limited to simply approving the amount hours listed and not calculating the correct pay rate for the amount of hours (Respondents' brief to the Court of Appeals page 10). As such the internal verbal and written complaints of Claudio-Gotay constitute actions adverse to his employer as in the case of *Conners* and not acts in furtherance of

his job responsibilities as in the case of *McKenzie* as the Court of Appeals concluded and through which Claudio-Gotay did engage in a FLSA protected activity.

Pertaining to Claudio-Gotays' refusal to actually sign the invoices submitted for his approval, the Court of Appeals rules that said activity by the Petitioner does not constitute a protected activity under the FLSA because according to a decision by the Court of Appeals for the Eighth Circuit he was also required to step outside his normal role in an action based on reasonable belief that his employer engaged in conduct contrary to the FLSA. *McKenzie v. Renberg's Inc.*, 94 F.3d at 1486, also *EEOC v. HBE Corp.*, 94 F.3d 543, 554 (8th Cir. 1998). Based primarily on *EEOC v. HBE Corp.*, the Court of Appeals concludes that as Claudio-Gotays' duties included the approval of the invoices, as ordered by his superiors, he did not step outside those duties when he once and again did not approve them. This conclusion of the Court of Appeals is also based on an error on the assessment of the facts of the case. In reality, Claudio-Gotay complained verbally to his superiors about the violation of the overtime provisions of the act on several occasions since the time the guards were assigned to his supervision and entered his complaint in writing one working day before he was dismissed from employment. The Court of Appeals erroneously interpreted the facts as if Claudio-Gotay had filed his written internal complaint, was later instructed by his superiors with the advise of corporate counsel to approve the invoices and then after Claudio-Gotay still insisted in not approving the invoices he was dismissed for insubordination. The distinction is important to the case as the scenario wrongly depicted by the Court of Appeals prevents Claudio-Gotay from establishing the time link between his filing of the

written complaint and his dismissal which rebuts the pretextual explanation by the employer and also establishes the retaliatory act. See *Conners v. Schnuck Markets, Inc.*, 121 F.3d at 1395, also, an employee can demonstrate a causal connection between the protected activity and the adverse employment action directly or circumstantially. Id. A causal connection can be demonstrated circumstantially through evidence that justifies an inference of retaliatory motive, such as a "very close" temporal proximity between the protected activity and adverse employment action. *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 199, 1206 (10th Cir. 2004).

The Eighth Circuit Court of Appeals has also published subsequent opinions that are contrary to the conclusions the First Circuit Court reached in the present case based on *EEOC v. HBE Corp*. Pertaining to an employees reluctancy to follow orders from his superiors and whether that reluctancy constitutes stepping outside his duties, said court has expressed that a manager engages in a protected activity when he opposes an action based on a reasonable belief that his employer has engaged in a discriminatory conduct, and it can include refusal to implement the discriminatory policy or take some action against it. *Foster v. Time Warner Entm't Co., L.P.*, 250 F.3d 1189, 1194 (8th Cir. 2001), citing *EEOC v. HBE Corp*. In the case of *Foster* as in the instant case the Petitioner repeatedly questioned his superior about the legality of the employers' actions and opposed its implementation due to his reasonable belief that implementing such policy would constitute furtherance of said illicit discriminatory action. Contrary to the instant case in *Foster* the lower court denied summary judgement when confronted with arguments most similar to the instant

case, and the Court of Appeals sustained such denial. Also, *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F. Supp. 2d 236 (DNY 2003). The Court of Appeals for the Ninth Circuit issued a similar opinion holding that a prima facie case of discrimination can be established when the employee protests or otherwise opposes unlawful employment practices against employees. Opposition which of course can include refusal to carry out an order or policy. *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

In the case of Claudio-Gotay at the time of his employment by Becton Dickinson he had long experience at the pharmaceutical industry, he is a law school graduate and had a reasonable good faith belief that his employers' conduct constituted a violation of the law. Furthermore the fact that his employer was not paying enough to the security company for them to pay the overtime to the guards does make Becton Dickinson liable co-employer under the Fair Labor Standards Act as decided in *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir. 1983). Claudio-Gotays' reasonable belief is confirmed. However, even if it were not confirmed as a matter of law, his good faith belief that such conduct would constitute a violation of the law was sufficient to provide him with a cause of action against retaliation for his dismissal. *Foster v. Time Warner Entm't Co., L.P.*, 250 F.3d at 1195; *McKay v. Town & Country Cadillac, Inc.*, 2002 U.S. Dist. LEXIS 6748 (D. Ill. 2002).

As for the content of Claudio-Gotays' internal complaint in support of Circuit Court concluding that he was not stepping outside his duties and thus not filing an internal complaint against his employer because in the letter he expresses that he had intention to bring the important issue outside to avoid potential liability for the

employer. Petitioner contends that if the letter is read fully and in proper context the unescapable fact is that it expresses Claudio-Gotay's belief that the regular pay rate is contrary to the law, that accepting such condition makes his employer liable and that it his understanding that his approval of the invoices would represent his approval and complicity of such illicit practices reason for which he would not approve them. A clear and unequivocal internal complaint.

As this letter was filed the day prior to the Petitioners' dismissal from employment, and his employer has repeatedly admitted that he was dismissed from employment because he refused to follow the order for him to participate in what Petitioners' believed was an employment action contrary to the Fair Labor Standards Act, it is an inescapable conclusion that Claudio-Gotay engaged in a protected activity, was dismissed from employment for having engaged in a protected activity under the Act. The requisites for an anti-retaliation claim under the Act are present as established by the Court of Appeals in *Blackie v. Maine, Supra.*

As discussed the jurisprudence of the Tenth and Eighth Circuit Courts of Appeals are contrary to the holding of the First Circuit in the present case. As such and because this Supreme Court of the United States has not solved this important issue of law, this Court should review the decision of the Court of Appeals in the present case, settle the contradictions and establish uniform law for all.

As the District of Connecticut stated "an employee should not be put to electing whether to risk sanctions [for implementing directives by his employer] or to jeopardize his continued employment," *Faulkner v. United Techs. Corp.*, 240 Conn. 576 at 584 (Conn. 1997).

The present state of law within the First Circuit Court of Appeals jurisdiction due the ruling in the present claim is precisely that employer can put their employees in the unfair position of having to choose to participate in a violation of the Fair Labor Standards Act, or any law for that matter, or be dismissed from employment for his refusal to participate in said activity despite the employee's reasonable belief that he would be participating in said illicit activity if he follows orders.

In its opinions, the Court of Appeals states that no employee is protected from usual business activity under the Act (Fair Labor Standards Act), thus he must follow what is ordered by his superiors. However it is basic contracts law in Puerto Rico, as is under common law doctrine, that no illegal act can be part of a lawful contract and as such instructing an employee to participate in a violation of the Fair Labor Standards Act can never constitute an ordinary business practice.

As before stated the Circuit Court's ruling in the instant claim is contrary to the rulings and doctrines established by both the Tenth and Eighth Circuit Courts of Appeals despite appearing to be based on those, discrepancy that which must be ruled upon by this Supreme Court of the United States. Moreover, this Supreme Court of the United States has never pronounced whether the refusal of an employee to participate in the implementation of an order which would, in the employees view, deprive another employee of his federally protected overtime payment rights would constitute a protected activity under said act. It is time that this Court makes such ruling and restores the dignity and rights against reprisal of those who should not be put by their employers to choose between breaking the law and keeping their jobs.

B. The Court Of Appeals Erred In Its Decision Pertaining To Dismissal Of The Supplemental Jurisdiction Claims When A Federal Claim Under ERISA, 29 U.S.C. § 1166(a)(2) Is Still Present In The Case And The Case Is At The Latter Stages Of Litigation Pending Only The Celebration Of The Hearing On The Merits Of The Remaining Causes Of Action.

United States court of federal jurisdiction may dismiss supplemental jurisdiction claim if "the district court has dismissed all claim over which it has original jurisdiction" or if "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c). Examples of exceptional circumstances include novel question of law, *Houlton Citizens' Coalition v. Houlton*, 175 F.3d 178, 192 (1st Cir. 1999).

The Court of Appeals for the First Circuit dismissed its supplemental jurisdiction over the state law claim in the present case supported by their holding on *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995) where it expressed that as a general principle, the unfavourable disposition of a Petitioners' federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims. However the dismissal of the supplemental state law claims is wholly inapplicable to the present case because as cited in *Rodriguez* dismissal of the supplemental jurisdiction claims is adequate in a case in which all federal law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine judicial economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state-law claims. Citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350

(1988). In the present case the Court of Appeals reversed the district courts' decision and ruled that Petitioners have indeed a cause of action under ERISA, 29 U.S.C. § 1166(a)(2) making the dismissal of the supplemental cause under local Law 80 improper as a matter of law.

In the present case the dismissal of the supplemental jurisdiction claim of the Petitioners will have a devastating effect on their cause. The present litigation has been on going since 2001, and has involved a significant amount of time and expense in the discovery of evidence and the ruling of dispositive motions. As of the time of initiation of the appellate procedures the case at the district court is near the hearing on the merits of the case. If the Petitioners' claim under state law is dismissed at this stage of the proceedings, all the procedure would have to reinitiate at the state court. Considering that time and expense involved in said claim already, said reinitiating would be impossible for the Petitioners.

As the present case still has significant and valid claim under federal law, the dismissal of the supplemental jurisdiction claim is contrary to the law and constitute an abuse of discretion that should be reversed by this Supreme Court.

C. The Present Petition Involves A Question Of Law Of Exceptional Importance Upon Which This Supreme Court Has Not Expressed, And If Left Unreviewed Would Lead To Significant Wrongdoing Upon Employees Who Will Be At The Mercy Of Employers Will To Impose Upon Them, And As Condition For Employment, That The Employees Engage In Activities Contrary To The Law When Commanded To Do So By The Employers.

The present state of law within the First Circuit Court of Appeals' jurisdiction due to the ruling in the present claim

is precisely that employers can put their employees in the unfair position of having to choose to participate in a violation of the Fair Labor Standards Act, or any law for that matter, or be dismissed from employment for his refusal to participate in said activity despite the employee's reasonable belief that he would be participating in said illicit activity if he follows orders.

In its opinion, the Court of Appeals states that no employee is protected from unusual business activity under the Act (Fair Labor Standards Act) thus he must follow what is ordered by his superiors. *Blackie v. Maine*, 75 F.3d at 724. However it is basic contracts law in Puerto Rico, as is under common law doctrine, that no illegal act can be part of a lawful contract and as such instructing an employee to participate in a violation of the Fair Labor Standards Act can never constitute an ordinary business practice. PR Laws Ann. 31 § 3372, 31 § 3421 and 31 § 3432.

As before stated the Circuit Courts' ruling in the instant claim is contrary to the rulings and doctrines established by both the Tenth and Eighth Circuit Court of Appeals despite appearing to be based on those. A discrepancy which must be ruled upon by this Supreme Court of the United States. Moreover, this Supreme Court of the United States has never pronounced whether the refusal of an employee to participate in the implementation of an order which would, in the employee's view, deprive another employee of his Federally protected overtime payment rights would constitute a protected activity under said act.

Review of the Court of Appeals' decision through a writ of certiorari will result in a standard legal precedent for the working citizens of the United States and for the

Petitioners whom are now confronted with contradictory doctrines among the circuit courts and the prospect of having to elect between breaking the law under orders of their superiors or suffering adverse employment actions if they refuse to follow such orders. It is time that this Court makes such ruling and restores the dignity and rights against reprisal of those employees, who should not be put by their employers to make such unfair options.

Respectfully submitted,

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October 2004

EFRAIN CLAUDIO-GOTAY, EFRAIN CLAUDIO-CRUZ, and ELIA M. GOTAY-CRUZ, Plaintiffs, Appellants, v. BECTON DICKINSON CARIBE, LTD.; VICTOR PAGAN, PERSONALLY AND AS GENERAL MANAGER OF BECTON DICKINSON CARIBE, LTD.; HIRAM OCASIO, PERSONALLY AND AS MANAGER OF BECTON DICKINSON CARIBE, LTD.; JOHN DOE; JANE DOE; INSURANCE COMPANY X & Y, Defendants, Appellees.

No. 03-1752.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

375 F.3d 99; 2004 U.S. App. LEXIS 14315; 150 Lab. Cas. (CCH) P34,873; 9 Wage & Hour Cas. 2d (BNA) 1404

July 13, 2004, Decided

COUNSEL: Jorge L. M. Cintron-Pabon, with whom Edgardo R. Jimenez-Calderin and Jimenez Calderin Law Offices were on brief, for appellants.

Manuel A. Nunez-Aragunde, with whom Manuel A. Nunez Law Offices, Martha L. Martinez-Rodriguez, Gloria M. De Corral-Hernandez, and De Corral & De Mier were on brief, for appellees.

JUDGES: Before Torruella, Circuit Judge, Coffin, Senior Circuit Judge, and Selya, Circuit Judge.

OPINION BY: TORRUELLA

OPINION:

TORRUELLA, Circuit Judge. Plaintiffs-appellants, Efrain **Claudio-Gotay** and his parents (hereinafter

jointly referred to as "Claudio"), filed suit under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and Puerto Rico Public Law 80, 29 P.R. Laws Ann. § 185(a), alleging that Claudio was wrongfully terminated from his employment by defendant-appellee Becton Dickinson Caribe, Ltd. ("Becton") and that Becton failed to give Claudio notice of his right to continued medical coverage. The district court granted summary judgment in favor of Becton. Claudio appeals. For the reasons stated below, we affirm in part and reverse in part.

I. Background

Claudio was hired by Becton as a Safety/Environmental & Process Engineer on September 28, 1998. After a month on the job, Claudio was informed that his responsibilities included monitoring the security guards at Becton's Juncos, Puerto Rico plant. This task included "seeing to it that the guards are there, that the [guards] render the service, and they give the service the contract specifies." In addition, Claudio was responsible for "approving the [guards'] invoices for payment."

The security guards at the Juncos plant were hired through CM Express Service Corp. ("CM Express"), a contractor. Upon examining the invoices submitted by CM Express, Claudio concluded that the security guards were not being properly compensated for overtime hours worked. Claudio spoke with his superiors about this potential labor violation and wrote a letter to Becton explaining the potential violation.

In response to Claudio's letter, Becton held a meeting, with Becton's lawyer in attendance, and determined that the security guards were not employees of Becton and, therefore, Becton was not responsible for ensuring that the guards received overtime pay. Becton decided that it would inform CM Express of the potential FLSA violations Claudio had identified. At the conclusion of the meeting, Claudio's supervisors told him that, in the meantime, he should approve the invoices. Claudio refused to do so and was terminated from employment.

II. Standard of review

"We review summary judgment decisions de novo, viewing the facts in the light most favorable to the non-moving party." *GTE Wireless, Inc. v. Cellexis Int'l, Inc.*, 341 F.3d 1, 4 (1st Cir. 2003) (citation omitted). A summary judgment motion should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We may affirm a grant of summary judgment on any ground supported by the record. *Geffon v. Micrion Corp.*, 249 F.3d 29, 35 (1st Cir. 2001).

III. Analysis

A. FLSA anti-retaliation provision

Claudio argues that he was wrongfully terminated because the FLSA makes it "unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint" related to the Act. 29 U.S.C. § 215(a)(3). The elements of a

retaliation claim under the FLSA require, at a minimum, a showing that (1) the plaintiff engaged in a statutorily protected activity, and (2) his employer thereafter subjected him to an adverse employment action (3) as a reprisal for having engaged in protected activity. *Blackie v. Maine,* 75 F.3d 716, 722 (1st Cir. 1996). The central issue on appeal is whether Claudio engaged in a statutorily protected activity that triggers the protection of 29 U.S.C. § 215(a)(3).

There are two incidents that Claudio contends fall within the ambit of filing a complaint. The first incident occurred when Claudio informed Becton, both orally and in writing, that the guards were not being paid overtime. The second incident occurred when Claudio refused to sign the invoices even after being told that Becton was not the employer of the guards.

As to the first incident, other circuits have held, and we agree, that "it is the assertion of statutory rights . . . by taking some action adverse to the company . . . that is the hallmark of protected activity under § 215(a)(3)." *McKenzie v. Renberg's Inc.,* 94 F.3d 1478, 1486 (10th Cir. 1996); *see also EEOC v. HBE Corp.,* 135 F.3d 543, 554 (8th Cir. 1998) (requiring action adverse to the company in a Title VII retaliation case). To engage in protected activity, "the employee must step outside his or her role of representing the company and . . . file . . . an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA." *McKenzie,* 94 F.3d at 1486. "A requirement of 'stepping outside' a normal role is satisfied by a showing that the employee took some action against a . . . policy . . . and that the action was based on a

reasonable belief that the employer engaged in . . . conduct" contrary to the FLSA. *HBE Corp.*, 135 F.3d at 554.

In *McKenzie,* the Tenth Circuit held that a personnel director did not engage in a protected activity by reporting overtime violations because her job responsibilities included "wage and hour issues." *McKenzie,* 94 F.3d at 1487. In contrast, the Tenth Circuit held in *Conner* that a food clerk engaged in a protected activity by reporting overtime violations because the employee had "no management responsibilities regarding the calculation of overtime wages." *Conner v. Schnuck Mkts.*, 121 F.3d at 1390, 1394. In *HBE Corp.,* the Eighth Circuit held that a personnel director engaged in a protected activity when he stepped outside his employment role by refusing to fire a black employee because the firing was ordered for patently discriminatory reasons. *HBE Corp.,* 135 F.3d at 554.

When Claudio first informed Becton of the potential overtime violations, he did so in furtherance of his job responsibilities. Claudio's job responsibilities included approving invoices documenting the guards' hours worked and their corresponding pay. As Claudio's letter to Becton indicates, Claudio was concerned with protecting Becton, not asserting rights adverse to Becton. *Compare id.* The letter stated:

> Acceptance of inappropriate conditions of salary payment by an outside contractor to their employees is an inappropriate practice of Becton Dickinson Juncos. Becton Dickinson Juncos and their representative officers can [sic] be responsible for this. . . .
>
> . . . .

> It is my intention by bringing out this important issue, [sic] avoid potential liability of Becton Dickinson Juncos before any future reclamation related with it.

As in *McKenzie,* Claudio "never crossed the line from being an employee merely performing his job . . . to an employee lodging a personal complaint." *McKenzie,* 94 F.3d at 1486. When Claudio first alerted Becton about a potential violation, therefore, he did not engage in a protected activity for purposes of 29 U.S.C. § 215(a)(3).

As to the second incident, we must determine whether Claudio's refusal to sign the invoices triggers the protection of 29 U.S.C. § 215(a)(3). There is a conflict among the circuits regarding what actions constitute the filing of a complaint. *See Valerio v. Putnam Assoc., Inc.,* 173 F.3d 35, 41 (1st Cir. 1999) (explaining the circuit split). This circuit, although not requiring an employee to file a formal complaint with a court or agency to receive FLSA protection, does require an employee to take action beyond mere "abstract grumblings." *Id.* at 44. Proceeding on a case-by-case basis, we analyze the facts to inquire whether the communications to the employer were sufficient to amount to a "filing of a complaint" as required by the FLSA. *Id.* at 45.

Before Claudio refused to sign the invoices, he attended a meeting with Becton's management discussing the guards' overtime pay. At the meeting, Becton's lawyer concluded that the guards were not employees of Becton and therefore that Becton was not responsible for paying the guards' overtime. As a preventive measure, however, Becton's management decided to send a letter informing CM Express that it might be violating the FLSA. Claudio, who was present during this meeting, heard the recommendation of the lawyer, was

informed that Becton was not responsible for paying the guards overtime, and knew that Becton was taking action nonetheless. Claudio was also specifically directed to approve the invoices.

We do not believe Claudio's refusal to sign the invoices constituted the filing of a complaint. The FLSA anti-retaliation provision protects an employee's lawful efforts to secure rights afforded by the FLSA. The FLSA does not, however, provide a "shield against legitimate employer actions." *Blackie,* 75 F.3d at 724. Claudio's refusal to sign the invoices occurred after the whistle had been blown and after corrective actions were being taken to remedy any FLSA violations. The FLSA was created to protect an employee who "lodges complaints or supplies information to officials regarding allegedly substandard employment practices and conditions." *Valerio,* 173 F.3d at 42 (citation omitted). Claudio's refusal to sign the invoices did neither. Therefore, Claudio's refusal to sign the invoices did not constitute the filing of a complaint.

B. Notification of health care coverage

The Consolidated Omnibus Budget Reconciliation Act ("COBRA") requires that employers allow former employees the opportunity to elect the continuation of their health care coverage for a period of time, at their own expense, if they are terminated. *See* 29 U.S.C. § 1161. When an employee is terminated, the employer is required to notify the plan administrator within thirty days of the termination. *See id.* § 1166(a)(2). The plan administrator is then required to notify "any qualified beneficiary" of his or her rights under COBRA within fourteen days of the date

on which the administrator is notified of the termination. *See id.* § 1166(a)(4) & (c).

Claudio alleges that Becton violated 29 U.S.C. § 1166 by failing to give him timely notice that he could continue his health care coverage. Claudio was terminated on January 22, 1999. At the latest, Claudio should have received notification of his rights by March 4, 1999.

Becton contends that a COBRA notification letter was sent via certified mail, return receipt requested,[1] to Claudio's address on record on January 27, 1999, and that the mailing of this letter constituted adequate notice.[2]

The issue in this case is not whether mailing a letter via certified first class mail constitutes adequate notice. Rather, the issue is whether there was evidence, sufficient to require summary judgment, that the letter was mailed. The district court held that there was evidence that the letter was mailed because Becton's custodian of records stated in a sworn declaration that the company complied with COBRA's notice requirements. The district court erred by relying on this alleged sworn declaration because, as Becton has conceded on appeal, no such sworn declaration exists.

There are two items in the record that pertain to COBRA notification. The first item is a COBRA notification

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[1] At oral argument, Becton's counsel stated that the letter was sent no return receipt requested. The evidence in the record and Becton's brief states that the letter was sent return receipt requested.

[2] Becton also contends that it sent Claudio a second letter on March 18, 1999, and personally handed Claudio's friend a third letter on March 18, 1999. These letters were sent outside the statutorily mandated time frame for informing Claudio of his COBRA rights.

letter dated January 27, 1999. The second item is a note, not a sworn affidavit, dated March 18, 1999, from "JLKA" to Claudio stating that his COBRA letter "was sent certified with acknowledgment of receipt on January 27 of 1999. The certification number is 093820179. We have never received the acknowledgment." Attached to the note is United States Postal Service Form 3811, which is a form that is attached to a piece of mail, signed by the recipient, and then returned to the sender. There is no signature showing that this form was ever received by Claudio and there are no markings on this form showing that it was ever mailed.

This evidence does not compel the conclusion that the letter was actually mailed; therefore, there is a genuine issue of material fact regarding whether Claudio was given adequate notice within the time period required by COBRA. *See, e.g., Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1231 (11th Cir. 2002) (holding that summary judgment is inappropriate where "there is no evidence that the agent sent out a notice to plaintiff, nor any evidence that the . . . necessary steps [were taken] to ensure . . . notification"); *Phillips v. Riverside Inc.*, 796 F. Supp. 403, 407 (E.D. Ark. 1992) (finding no actual evidence that the COBRA letter was mailed). We therefore reverse the district court's grant of summary judgment in favor of Becton on this issue.

C. Claims under Puerto Rico law

The district court declined to exercise supplemental jurisdiction over Claudio's Puerto Rico law claim after it granted summary judgment to Becton and dismissed the FLSA claim. Since we affirm the district court's dismissal

of the FLSA claim, we also affirm the district court's dismissal without prejudice of Claudio's Puerto Rico law claim. *Cf. Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995) ("As a general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims.").

IV. Conclusion

For the forgoing reasons, the judgment of the district court is affirmed in part and reversed in part. We remand for proceedings consistent with this opinion. Each party shall bear its own costs.

Affirmed in part, reversed in part and remanded.

EFRAIN CLAUDIO GOTAY, et al,
Plaintiffs
v.
BECTON DICKINSON CARIBE LTD., et al,
Defendants

CIVIL NUM. 01-1088(SEC)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

257 F. Supp. 2d 498; 2003 U.S. Dist. LEXIS 6147;
8 Wage & Hour Cas. 2d (BNA) 1206

March 31, 2003, Decided
April 10, 2003, Opinion Filed

COUNSEL: For De-Corral-Hernandez, defendant: Gloria M. De-Corral-Hernandez, De Corral & De Mier, San Juan, PR.

For Martinez-Rodriguez, defendant: Martha L. Martinez-Rodriguez, Manuel A. Nunez Law Offices, San Juan, PR.

For Estrella, plaintiff: Alberto G. Estrella, William Estrella Law Offices, San Juan, PR.

For Mirandes, plaintiff: Enrique A. Mirandes, Delgado & Fernandez, San Juan, PR.

For Suria-Rivera, plaintiff: Kenneth C. Suria-Rivera, San Juan, PR.

For Valiente, plaintiff: Antonio E. Valiente, San Juan, PR.

JUDGES: SALVADOR E. CASELLAS, United States District Judge.

OPINION BY: SALVADOR E. CASELLAS

OPINION:

OPINION AND ORDER

Pending before the Court is Defendants' motion requesting summary judgment pursuant to Fed. R. Civ. P. 56 **(Docket # 37)**. Plaintiff has timely filed an opposition to such motion **(Docket # 43)** and Defendants have filed a reply to said opposition **(Docket # 49)**. Upon careful review of the parties' arguments and the applicable law, Defendants' motion will be **GRANTED**.

Factual Background

Plaintiff Efrain **Claudio-Gotay** (Claudio) brought the above captioned claim under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* ("FLSA"), the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA") and Public Law 80, of May 30, 1976, as amended, 29 P.R. Laws Ann. § 185a *et seq.* ("Law 80") on the grounds that Defendant Becton Dickinson (BD) unjustly dismissed him from his employment on January 22, 1999. Plaintiff argues that his dismissal was a retaliatory action by Defendant because of his reporting of alleged irregularities in the payment of salaries to the plant's security guards by their employer, CM Express Service Corp. ("CM Express"), a subcontractor hired by Becton Dickinson. On the other hand, Defendants argue that his dismissal was due to his crass insubordination and for not meeting the company's expectations. Claudio's parents have also joined as Plaintiffs requesting compensation for their emotional and mental suffering.

Standard of Review

Fed. R. Civ. P. 56(b) provides that: "A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part [of the claims asserted against him/her]." The Court may grant the movant's motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *NASCO, Inc. v. Public Storage, Inc.*, 29 F.3d 28 (1st Cir. 1994). "The principal judicial inquiry required by Rule 56 is whether a genuine issue of material fact exists." Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2725, p. 401.

In this regard, the First Circuit Court of Appeals has noted that for a dispute to be "genuine", there must be sufficient evidence to permit a reasonable trier of fact to resolve the issue in favor of the non-moving party. *U.S. v. One Parcel of Real Property,* 960 F.2d 200, 204 (1st Cir. 1992); *See also Boston Athletic Assn. v. Sullivan,* 867 F.2d 22, 24 (1st Cir. 1989); *Medina Munoz v. R.J. Reynolds Tobacco,* 896 F.2d 5, 8 (1st Cir. 1990) ("A 'genuine' issue is one that must be decided at trial because the evidence, viewed in the light most favorable to the non-movant, would permit a rational fact finder to resolve the issue in favor of either party.") (citations omitted).

By like token, "material" means that the fact is one that might affect the outcome of the suit under the governing law.

Morris v. Government Development Bank of Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994). "A fact is material if it tends to resolve any of the issues that have been properly raised by the parties." Wright, Miller & Kane, *supra,* § 2725 at p. 419. "Not every genuine factual conflict necessitates a trial. It is only when a disputed fact has the potential to change the outcome of the suit under the governing law if found favorably to the non-movant that the materiality hurdle is cleared." *Martinez v. Colon,* 54 F.3d 980, 983-984 (1st Cir. 1995).

In addition, when determining whether to grant summary judgment, the Court may not weigh the evidence. *Casas Office Machines, Inc. v. Mita Copystar America, Inc.,* 42 F.3d 668 (1st Cir. 1994). Summary judgment "admits of no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails." *Id.* (*citing Greenburg v. Puerto Rico Maritime Shipping Authority,* 835 F.2d 932, 936 (1st Cir. 1987)). Accordingly, if the facts permit more than one reasonable inference, the court on summary judgment may not adopt the inference least favorable to the non-moving party. *Casas Office Machines,* 42 F.3d at 684.

While the moving party has the burden of initially establishing that there is "an absence of evidence to support the nonmoving party's case", *Maldonado-Denis v. Castillo-Rodriguez,* 23 F.3d 576, 581 (1st Cir. 1994); **the non-movant has a "corresponding obligation to offer the court more than steamy rhetoric and bare conclusions."** *Lawton v. State Mutual Life Assurance Company of America,* 101 F.3d 218, 223 (1st Cir. 1996) (emphasis added). Furthermore, **"the non-movant must produce specific facts, in suitable evidentiary form**

sufficient to limn a trial worthy issue . . . Failure to do so allows the summary judgment engine to operate at full throttle." *Id.; see also Kelly v. United States,* 924 F.2d 355, 358 (1st Cir. 1991) (emphasis added) (warning that "the decision to sit idly by and allow the summary judgment proponent to configure the record is likely to prove fraught with consequence."); *Medina Munoz,* 896 F.2d at 8, *quoting Mack v. Great Atlantic and Pacific Tea Co.,* 871 F.2d 179, 181 (1st Cir. 1989) ("The evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a fact finder must resolve.")

Applicable Law and Analysis

Fair Labor Standard Act Anti-Retaliation Clause Claim

The FLSA anti-retaliation provision states:

> It shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

In *Williamson v. General Dynamics Corp.,* 208 F.3d 1144 (9th Cir. 2000), the Court of Appeals for the Ninth Circuit held that:

> The purpose of the anti-retaliation provision is: 1) to provide an incentive for employees to report wage and hour **violations by their employers;** 2) to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance; 3) to ensure that employers are not compelled to risk their jobs in order to assert their wage and hour rights under the Act.

(emphasis added). In *Williamson,* the Court also held that "the FLSA anti-retaliation provision protects not only employees who have filed complaints in court or with an agency but also employees who have complained to their employers."

The elements of a retaliation claim under the FLSA require a showing that: 1) **the plaintiff engaged in a statutorily protected activity;** and 2) his employer thereafter subjected him to an adverse employment action; 3) as a reprisal for having engaged in the protected activity. *See Cordero v. Turabo Medical Center Partnership,* 175 F. Supp. 2d 124, 127 (D.P.R. 2001) *citing Blackie v. State of Maine,* 75 F.3d 716, 722 (1st Cir. 1996). (emphasis added).

In *Valerio v. Putnam Associates Inc.,* 173 F.3d 35 (1st Cir. 1999), an employee was asserting her statutory rights to overtime pay and pleaded the protection of the FLSA retaliation provision regarding such pay. The Court of Appeals for the First Circuit held that "the employee's overtime pay would be calculated under FLSA regulation applicable to fixed salary for fluctuating hours and that the FLSA retaliation provision protects an employee who has lodged a written internal complaint with the employer." *Id.* In synthesis, the Court held that the meaning of "filing of any complaint" requires a factual analysis on a case by case basis and includes not only a legal complaint,

but also includes internal employee complaints. *Id.* and *See also Williamson,* 208 F.3d 1144. However, in *Lambert v. Ackerley,* 180 F.3d 997 (9th Cir. 1999), the Court of Appeals for the Ninth Circuit noted that in *Valerio,* 173 F.3d 35, "the First Circuit went on to state that not all abstract grumblings will suffice to constitute the filing of a complaint with one's employer. Not all amorphous expressions of discontent related to wages and hours constitute complaints filed within the meaning of section 215(a)(3)."

Defendant argues that Plaintiff Claudio did not engage in protected activity under the FLSA. The argument is based in the fact that Claudio's report of alleged irregularities on the payment of salaries was not about violations of his employer, Becton Dickinson. As part of the duties of his position, Claudio had to overlook the security guards and approve for payment the invoices sent by CM Express, the company that was subcontracted to provide security. During the course of his employment, Claudio brought to the attention of Becton Dickinson's management alleged irregularities with the method of invoicing and salary payment to the guards from the security company.

However, Plaintiffs argue that due to the employment relationship between Becton Dickinson and CM Express and the First Circuit Court of Appeals' holding in *Baystate Alternative Staffing, Inc. v. Herman, Secretary of Labor,* 163 F.3d 668 (1st Cir. 1998), Defendants can be characterized as co-employers of the security guards.

In *Baystate,* the Court of Appeals for the First Circuit held that "to determine whether an employment relationship exists for the purposes of federal welfare legislation, courts look not to the common law conceptions of that

relationship, but rather to the 'economic reality' of the totality of the circumstances bearing on whether the putative employee is economically dependent on the alleged employer." *Id.* at 675. Thus, the Court of Appeals concluded that the temporary agency was the "employer" of temporary workers for purposes of the FLSA, notwithstanding the alleged simultaneous employer status of the agency's client companies. *Id.* at 675-76.

The question of "employer" status under the FLSA is one of law. *Bonnette v. California Health and Welfare Agency,* 704 F.2d 1465, 1469 (9th Cir. 1983). Under the FLSA, the definition of employer encompasses persons and working relationships that prior to the enactment of the Act were not deemed to fall under the employer-employee category. *Baystate,* 163 F.3d at 675. The FLSA contemplates several simultaneous employers, each responsible for compliance with the Act. *Baystate,* 163 F.3d 668; *Ealk v. Brennan*, 414 U.S. 190, 195, 38 L. Ed. 2d 406, 94 S. Ct. 427 (1973); *Bonnette,* 704 F.2d at 1469-70. "The determination of whether an employer-employee relationship exists does not depend on "isolated factors but rather upon the circumstances of the whole activity . . . (citations omitted). The touchstone is economic reality". *See Bonnette,* 704 F.2d at 1470 (the Court of Appeals held that under the FLSA, the public social service agencies were "employers" of chore workers providing domestic in-house services to disabled public assistance recipients, where chore workers' wages were paid by agencies, agencies exercised considerable control over structure and conditions of employment, and agencies' power over employment relationship by virtue of their control of purse strings was substantial)

In the instant case, it is uncontested that, the employer of the security guards was CM Express, the security

subcontractors. Moreover, it is also uncontested that Claudio refused to authorize the bills sent by CM Express as ordered by his supervisors on several occasions. Furthermore, Plaintiffs have not presented any allegation or evidence that indicates the contrary or that establishes an employer-employee relationship between Defendant Becton Dickinson and the security guards. It is undisputed that CM Express paid the guards' salaries. Therefore, Becton Dickinson cannot be considered an employer like the public social service agencies in *Bonnette*. The economic reality of the case at bar is that the guards salary was paid by the subcontractor, CM Express. Any alleged overtime owed to the guards was owed by that employer, not Becton Dickinson. Therefore, when Claudio reported the alleged irregularities in the payment of overtime by CM Express to its employees, he was not protecting his own statutory rights under the FLSA. His alleged internal complaint involved the conduct of an employer that was not his own. Becton Dickinson was not the one responsible for the alleged salary violations. Therefore, his reporting of alleged salary payment irregularities by CM Express does not amount to an internal complaint protected under the FLSA. Thus, Claudio does not meet the first element of a retaliation claim under the FLSA because he did not engage in a statutorily protected activity and was not at risk of losing his job with CM Express, since the company was not his employer, nor was it responsible for his salary payments.

The purpose of the FLSA is to prevent that the employee risk his job by asserting his statutory rights, not the alleged statutory rights of employees who are not his co-workers, employed by another employer that is not his own. In the instant case, the alleged violator of the FLSA

was not Plaintiff's employer but CM Express, the subcontractor. Thus, the Court must conclude that the reason for Claudio's dismissal was a non-retaliatory one and his claim under the FLSA will be **DISMISSED WITH PREJUDICE**.

Consolidated Omnibus Budget Reconciliation Act (COBRA) Claim

Under COBRA, 29 U.S.C. § 1166, continuation coverage is available to "qualified beneficiaries." Qualified beneficiaries include employees and their dependents. *See* 29 U.S.C. § 1167(3). One of several "qualifying events must occur for a qualified beneficiary to receive continuation coverage." 29 U.S.C. § 1163. Termination of employment for any reason other than gross misconduct is one of the qualifying events that entitles an employee to receive continuation coverage. 29 U.S.C. § 1163(2).

When a qualifying event, such as termination, occurs, the employer must notify the plan administrator of the qualifying event within thirty (30) days; the administrator then has fourteen (14) days after it receives notice (or longer if specified in the plan itself) in which to notify the qualified beneficiaries of their right to receive continuation coverage. *See* 29 U.S.C. § 1166. A qualified beneficiary has at least sixty (60) days after the termination of coverage under a benefit plan to elect continuation coverage. He or she must be afforded sixty (60) days from the latter of either the termination of coverage or the receipt of notice to elect continuation coverage. 29 U.S.C. § 1165(1). A qualified beneficiary's election of continuation coverage is effective as to any other qualified beneficiary who would lose coverage by virtue of the same qualifying event. 29

U.S.C. § 1165(2). The maximum length of time a plan must provide continuation coverage to employees who are terminated is eighteen (18) months from the date of the qualifying event. Continuation coverage may terminate earlier if the qualified beneficiary fails to make timely premium payments, 29 U.S.C. § 1162(2)(C) or if the qualified beneficiary becomes covered under another group health plan. 29 U.S.C. § 1162(2)(D).

In *Meadows v. Cagle's Inc.* 954 F.2d 686 (11th Cir. 1991), the Court held that the "COBRA notice must be sent to someone capable of acting intelligently on it", but nowhere does it state that the notice itself need do more than make clear that the beneficiary must make an election under COBRA in order to receive continued coverage. In the case of *Hummer v. Sears, Roebuck,* 1994 U.S. Dist. LEXIS 3659, 1994 WL 116117 at *6 (E.D. Pa.), the Court held that pertinent federal decisions support the conclusion that the employer's only obligation under COBRA, to notify of the extended coverage, was to provide a good-faith notice of the rights under this Act. Good-faith notification requires nothing more than that plan beneficiaries receive notice of their option to elect continued coverage, that no part of the notice be false or deceptive, and that plan administrators act as fiduciaries in handling inquiries from eligible parties during the COBRA election period. *Id.* In *Lucinda Bixler v. Central Pennsylvania Teamsters Health,* 12 F.3d 1292 (3rd Cir. 1993), the Court held that an employer satisfied its fiduciary duty to qualified beneficiaries with respect to COBRA, when the employer had placed the proper address on a notice.

Plaintiffs allege that Defendants did not comply with their obligations under the COBRA. Nonetheless, Defendants have produced with their motion a Sworn Declaration

from Paul V. Gutierrez, dated August 6, 2002, in which he states, as custodian of the records of all COBRA notifications, that Defendants did in fact comply with the requirements of COBRA. Defendants have also produced a copy of the official record of the notification which was made to Plaintiff. Plaintiff has not disputed in any way the authenticity of this record, which, in any case has been authenticated by the custodian's sworn declaration.

The Court finds that Becton Dickinson provided good faith notification to Claudio about his rights under ERISA and more specifically, under the COBRA by sending the notification to his address of record. On January 27, 1999, Becton Dickinson sent Claudio the COBRA notification via certified mail, return receipt requested, to his address of record. On March 18, 1999, Becton Dickinson again sent Claudio the COBRA notification via certified mail, return receipt requested to his address of record. On March 18, 1999, the COBRA notification was also personally handed to Cesar Rivera, who picked it up on Claudio's behalf. *See* Defendant's Summary of Uncontested Material Facts at ¶ 20. Plaintiffs' only argument is that he never received said notifications and that Defendant does not have the return receipt. These conclusory allegations are not enough to controvert the evidence presented by Defendants.

As the record evidence reveals, both notices were timely and clearly informed Claudio that he was entitled to continuing coverage if a qualifying event occurred, and provided general information about the possible duration of coverage, payment schedule and cost. Becton Dickinson provided good faith notice to Claudio about his rights under COBRA. These facts establish that there is no genuine issue of a material fact as to the adequacy of the

COBRA notification to Claudio. Therefore, Plaintiffs' claim under ERISA for violation of Claudio's rights under COBRA will be **DISMISSED WITH PREJUDICE.**

Unjust Dismissal Act (Law 80) Claim

Plaintiff Claudio invokes this Court's supplemental jurisdiction for his claim under local Law 80. It is Hornbook law that a district court has discretion to exercise supplemental jurisdiction over the state law claims where the state and federal claims derive from a common nucleus of operative facts. 28 U.S.C. § 1367; *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). Nevertheless, where, as here, all federal claims warrant dismissal prior to trial, the district court will decline to exercise supplemental jurisdiction.

It has been stated that the holding in *Gibbs* "seems to clearly require dismissal without action on the merits and without any exercise of discretion if all the federal claims . . . are found to be short of trial, deficient." *Snowden v. Millinocket Regional Hosp.,* 727 F. Supp. 701, 709 (D. Me. 1990). Such a result is warranted in view that "[t]he power of a federal court to hear and to determine state-law claims in non-diversity cases depends upon the presence of at least one 'substantial' federal claim in the law suit." *Newman v. Burgin,* 930 F.2d 955, 963 (1st Cir. 1991).

Although District Courts are not obliged to dismiss pendent state law claims, in the usual case in which all federal law claims are dismissed before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness and comity – will point toward declining to exercise jurisdiction over the remaining state law claims. In such a case, state-law claims should be dismissed. *Carnegie-Mellon*

University v. Cohill, 484 U.S. 343, 350 n.5, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988); *citing Gibbs,* 383 U.S. at 726-27; *see also Mercado-Garcia v. Ponce Federal Bank,* 979 F.2d 890, 896 (1st Cir. 1992); *Rivera v. Murphy,* 979 F.2d 259, 264 (1st Cir. 1992); *Figueroa Ruiz v. Alegria,* 896 F.2d 645 (1st Cir. 1990); *cf. Vega v. Kodak Caribbean,* 3 F.3d 476, 478 (1st Cir. 1993) (holding that "when the district court disposed of the ADEA claims, the pendent claims became subject to dismissal for want of subject matter jurisdiction"); *Feinstein v. Resolution Trust Corp.,* 942 F.2d 34, 47 (1st Cir. 1991) (stating that "since federal question jurisdiction hinged on that [dismissed] count, and there was no complete diversity of citizenship or other cognizable basis for the assertion of subject matter jurisdiction in the district court, the pendent state law claims were properly dismissed under the rule of *United Mine Workers v. Gibbs*").

Supplemental jurisdiction will be declined in this case in view that the state law claims are substantially derived from the same operative facts of the previously dismissed federal claims. The Supreme Court has held that judicial economy, convenience, fairness and comity favors "a decision to relinquish jurisdiction when state issues predominate, whether in terms of proof, of the scope of the issues raised, or the comprehensiveness of the remedy sought." *Carnegie-Mellon,* 484 U.S. at 350 n.5, citing *Gibbs,* 383 U.S. at 726. *See also Fabregas v. ITT Intermedia, Inc.,* 13 F. Supp. 2d 225, 229 (D.P.R. 1998). Accordingly, Plaintiffs' claims under local Law 80 are hereby **DISMISSED WITHOUT PREJUDICE**

Conclusion

For the herein stated reasons, Plaintiffs' claims under the Fair Labor Standards Act, and the Employee Retirement Income Security Act will be **DISMISSED WITH PREJUDICE**. Furthermore, the Court will not exercise its discretion to entertain the remaining claims under the and, therefore, will **DISMISS WITHOUT PREJUDICE** said claims. Finally, since Claudio's claims of retaliation under the FLSA do not survive as a matter of law, the contingent claims for recovery of emotional and mental suffering brought by Claudio and his parents, Co-plaintiffs Efrain Claudio Cruz and Ella N. Gotay Maldonado will also be **DISMISSED WITHOUT PREJUDICE**.

SO ORDERED.

In San Juan, Puerto Rico, this 31st day of March, 2003.

SALVADOR E. CASELLAS

United States District Judge

BECTON
DICKINSON

MEMORANDO **Safety Environmental**

TO : **DISTRIBUTION**

FROM : **E. CLAUDIO**

DATE : **JANUARY 18, 1999**

SUBJECT : **CEM EXPRESS INVOICING AND SALARY PAYMENT**

This memo is to establish a situation related with inappropriate method of invoicing and salary payment to CM Express security guards. Myself detected this situation during a meeting with CM representative Gregorio Matos on October 19, 1998. This situation was informed and discussed with Hiram Ocasio, Carmen Correa, Victor Pagán, Angel Vásquez and Carmen Calcaño.

CM Express has a contract where established a payment rate of 6.25 dollars per working hour per security guard in a twenty-four hour period. This rate was applicable to the security functions provided by CM Express to Becton Dickinson Juncos facilities. In a meeting with CM Express Representative, Gregorio Matos on October 19, 1998, I exposed my concern related with invoice statement of shifts where one security guard worked beyond eight hour per request of Becton Dickinson Juncos. We agreed and established that all working hour beyond eight, per request from Becton Dickinson Juncos, should be paid as extra time to security guards. This agreement was informed to Hiram Ocasio and Angel Vásquez. Related with this agreement, Angel Vásquez expressed

that CM Express contract established an hourly rate independent of number of working hours per employee.

Therefore this agreement, CM Express continues invoicing all working hours, including those working beyond eight by one employee, as regular one. For this reason I contact CM Express and inquire Mr.G. Matos why they continue invoicing in such way. Mr. G. Matos responds that it is the agreement with Becton Dickinson Juncos for years.

I understand that current invoice and payment method of CM Express to their employees is inappropriate and not in accordance to applicable laws and regulation of fair labor practices. Becton Dickinson Juncos can be responsible in case of salary claim to CM Express employees to them, by means of contract acceptance and invoicing payment as established on it.

Acceptance of inappropriate conditions of salary payment by an outside contractor to their employees is an inappropriate practice of Becton Dickinson Juncos. Becton Dickinson Juncos and their representative officers can be responsible for this.

Is responsibility of Becton Dickinson Juncos establish and warrant fair labor practice to all our employees and assure that contract and temporary employees be treat fair by their own employer. By means of approval and acceptance of contract and invoice statement from employer, that is known that did not follow fair labor practice with their employees, Becton Dickinson Juncos officers can be potentially liable for this. This undesirable practice of CM Express must not be support in any way by Becton Dickinson Juncos.

For this reason I recommended a detailed evaluation of current contract relation with CM Express. This evaluation should included and not limit to all procedures of CM Express related with fair labor practice according applicable regulations and laws. While this situation is not clearly and appropriate solved between all affected parties, I will not approve any invoice from CM Express that, according to applicable laws, do not represent fair salary payment practices to CM Express employees assigned to Becton Dickinson Juncos. I understand that my approval of invoice from CM Express under actual contract condition relation may represent my approval of their unfair labor practice.

Is my intention by bringing out this important issue, avoid potential liability of Becton Dickinson Juncos before any future reclamation related with it. By means of strong enforcement and assurance that all contract employer by Becton Dickinson Juncos comply with required fair labor practice with their employees, Becton Dickinson Juncos guaranteed their responsibility and good faith with them. I am available to help in the process of request to CM Express fully accomplishment of all applicable fair labor practice related with this situation. I am sure this issue will be solved promptly and in an appropriate way for the convenience of all affected party.

Distribution:
Victor Pagán (with attachment)
Carmen Calcaño
Carmen Correa
Hiram Ocasio
Angel Vázquez

Supreme Court, U.S.
FILED
DEC 22 2004
OFFICE OF THE CLERK

(2)

No. 04-590

IN THE

Supreme Court of the United States

EFRAÍN CLAUDIO-GOTAY, EFRAÍN CLAUDIO-CRUZ, ELIA M. GOTAY-MALDONADO, PETITIONERS

v.

BECTON DICKINSON CARIBE, LTD.; VÍCTOR PAGÁN, PERSONALLY AND AS GENERAL MANAGER OF BECTON DICKINSON CARIBE, LTD.; HIRAM OCASIO, PERSONALLY AND AS MANAGER OF BECTON DICKINSON CARIBE, LTD.; JOHN DOE; JANE DOE; INSURANCE COMPANY X & Y

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONERS[1]

I. Whether the United States Court of Appeals for the First Circuit erred in ruling that an employee does not engage in a Fair Labor Standards Act protected activity when he complains about a violation of the overtime payment provisions and refuses to participate in furthering said violation of right on the

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[1] As we will address in the body of our Opposition, Respondents perceive that Petitioners are misstating facts and the applicable law, even in the Questions presented for review, hence the proper issues that would be before this Honorable Court if Certiorari is granted, differ from the ones presented in the Petition. We believe that the proper Questions presented for review should be:

Question presented for review

I. Whether the United States Court of Appeals for the First Circuit erred in ruling that an employee does not engage in a Fair Labor Standards Act protected activity when as part of his duties he informed his employer, in order to protect him, about the potential violation of the overtime provisions of a subcontractor toward that third party's employees, and then refuses to comply with his duties after been instructed to and been advised by his employer's attorney that there was no illegal act from the employer, but compliance with payment of services rendered upon a valid contract has to be made.

II. Whether the United States Court of Appeals for the First Circuit erred in dismissing the pendant jurisdiction wrongful termination claim in the district court proceedings when the federal claim related to the same facts was dismissed and the remaining federal question claim under COBRA act, is separate and independent of the facts of the state claim, for which the district court has discretion to exercise or not supplemental jurisdiction.

employees he supervised, and thus he is not entitled to a cause of action against his former employers under said statue anti- retaliation provisions.

II. Whether the United States Court of Appeals for the First Circuit erred in dismissing the pendant jurisdiction wrongful termination claim late in the district court proceedings when there is still a Federal question claim under the COBRA Act before the Federal District Court related to which pendant jurisdiction should be exercised pertaining to the wrongful discharge claim.

PARTIES

Petitioners:

Efraín Claudio Gotay –former employee of Becton Dickinson Caribe, Ltd.

Efrain Claudio-Cruz[2] – individual and father of Efraín Claudio Gotay

Elia M. Gotay-Maldonado[3] – individual and mother of Efraín Claudio Gotay

Respondents:

Becton Dickinson Caribe, Ltd. – a duly incorporated organization

Victor Pagan – General Manager of Becton Dickinson Caribe Juncos Plant

Hiram Ocasio- Manager at Becton Dickinson Caribe, Juncos Plant

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[2] Was identified in the Petition as Efraín Claudio Elías.

[3] Was identified in the Petition as Elia M. Gotay Cruz.

RULE 29.6

Respondent Becton Dickinson Caribe, Ltd. is affiliate to Becton Dickinson Medical, which is a subsidiary of Becton, Dickinson and Company. The latest is a publicly trade enterprise in the New York Stock Exchange with the financial symbol BDX.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

RULE 29.6 iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

INTRODUCTION 1

STATEMENT 3

PETITIONERS' MISSTATEMENTS OF THE FACTS 6

REASONS FOR DENYING THE PETITION 9

1) There is no Circuit split on the Question Presented 10

   a) The First Circuit Court's ruling is not in contravention of the holdings of other Circuit Courts. 10

   b) Petitioners misstate the jurisprudence regarding refusal to carry out an order or policy 15

2) The Court of Appeals did not abuse its discretion to affirm the District Court's decision to decline the exercise of supplemental jurisdiction 21

CONCLUSION 25

APPENDIX

Security Guard Contract 1ra

Invoices 6ra

TABLE OF AUTHORITIES

Page

CASES

Blackie v. State of Maine, 75 F.3d 716, 722 (1st Cir. 1996) 2, 11

Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 876-78 (2d Cir.1988) 2, 11

Carnegie-Mellon Univ., 484 U.S. at 350 n. 7, 108 S.Ct. at 619 n. 7 24

Castillo v. Givens, 704 F. 2d. 181, 188 (5th Cir. 1983) 18, 19

Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) 2, 11

City of Chicago v International College of Surgeons, 522 US 156 (1997) 23

Conner v. Schnuck Mkts., Inc., 121 F.3d 1390, 1394 (10th Cir.1997) 2, 11-13

Cordero v. Turabo Medical Center Partnership, 175 F.Supp. 2d 124, 127 (D.P.R. 2001) 11

EEOC v. HBE Corp., 135 F. 3d. 543 (8th Cir. 1998) ..... *passim*

Faulkner v. United Techs. Corp., 240 Conn. 576 at 784 (Conn. 1997) 20

Foster v. Time Warner Entertainment Company, L.P., 250 F. 3d. 1189(8th Cir. 2001) 1, 17

Gonzalez- De Blasini v Family Department, 377 F3d 81 (1st Cir. 2004) 24

Hooven- Lewis v. Caldera, 249 F. 3D. 259, 278 (4TH Cir. 2001).....2

Kanida v. Gulf Coast Medical Personnel, LP., 363 F.3d 568 (5TH Cir. 2004).....2, 11

Martinez v. Colon, 54 F.3d 980, 990 (1st Cir.1995).....23

McDonnell Douglas v. Green, 411 US 792, 36 L. ED. 2d. 668, 93 S.Ct. 1817 (1973). 2, 13

McKenzie v. Renberg's, Inc., 94 F. 3d. 1478, 1486 (10th Cir. 1996).....*passim*

Moor v. Alameda County, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).....22

Moyo v. Gomez, 40 F. 3d. 982, 984 (9th Cir. 1994).....2, 11

Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co., 215 F.3d 195, 200 (1st Cir.2000).....23

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).....2

Richmond v. ONEOK, Inc., 120 F. 3d. 205 (10th Cir. 1997).....11

Rios v. Rossotti, 252 F.3d 375, 380 (5th Cir.2001).....2, 11

Rodriguez v Doral Mortgage Corporation, 57 F3d 1168, 1177 (1st Circuit 1995).....23

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585; 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).....22

Seaman v. CSPH, Inc., 179 F.3d 297, 301 (5th Cir. 1999).....2, 11

Serrano-Moran v. Grau-Gaztambide, 195 F.3d 68 (1st. Cir. 1999) 24

Tomaiolo v. Mallinoff, 281 F.3d 1(1ST. Cir. 2002) 22

United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966) 22, 23

Vera-Lozano v. International Broad., 50 F.3d 67, 70 (1st Cir.1995) 22

Williamson v. General Dynamics Corp., 208 F.3d 1144 (9th Cir. 2000) 10

Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) 22

FEDERAL STATUTES

29 USC § 201 3

29 U.S.C. § 215(a)(3) 10

28 USCS § 1367(c) 23

29 USC §1001 3

RULES

Rules 22 and 30 5

PUERTO RICO STATUTES

Act. No. 80 of May 30, 1976 25

29 P.R. Laws Ann. §185a.....25

INTRODUCTION

The United States Court of Appeals for the First Circuit invoked the elements required by the Fair Labor Standards Act, herein FLSA, to show a retaliation, and relied on what is a statutorily protected activity that triggers the protection of the FLSA anti-retaliation provision to determine that Petitioner Claudio Gotay did not engage in a protected activity while informing his employer about potential FLSA violations of a third party that was not his employer. The criteria relied upon by the Court of Appeals is consistent with the case law of the states and federal courts' decisions. There is no conflict among the Circuits on the application of the FLSA anti retaliation provision criteria required by the Statute.

Petitioners try to create a split within the Circuits where none exists, by pointing to a case with totally dissimilar facts, where an employee refused to comply with an order of her employer that was contrary to the company's manual and could violate her subordinate employee's rights under ADA. *Foster v. Time Warner Entertainment Company, L.P.*, 250 F. 3d. 1189 (8th Cir. 2001). Petition at 15. However, even in that case, the issue for the court was to determine whether under the facts presented Plaintiff stepped out of her duties and incurred in protected activity. For that ruling the Eighth Circuit applied the same criteria of the other circuits.

The Circuits have recognized that in order to establish a prima facie retaliation claim under FLSA, three basic elements must be shown: 1) the plaintiff engaged in a statutorily protected activity; 2) his employer thereafter subjected him to an adverse employment action; and 3) as a reprisal for having

engaged in the protected activity. *Blackie v. State of Maine*, 75 F.3d 716, 722 (1st Cir. 1996); EEOC v. HBE Corporation, 135 F. 3d. 543, 554 (8th Cir. 1998); *Hooven-Lewis v. Caldera*, 249 F. 3D. 259, 278 (4TH Cir. 2001) (retaliation claim under the Rehabilitation Act); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998); *Moyo v. Gomez*, 40 F. 3d. 982, 984 (9th Cir. 1994); *Kanida v. Gulf Coast Medical Personnel, LP.*, 363 F.3d 568, (5TH Cir. 2004) (Retaliation claims under the FLSA are also subject to the McDonnell Douglas analytical framework); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 876-78 (2d Cir.1988) (holding that *McDonnell Douglas* pretext analysis applies to FLSA claims); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir.1997) ("In analyzing FLSA retaliation claims, we apply the shifting burden of proof scheme initially articulated in McDonnell Douglas."). *See, e.g., Rios v. Rossotti*, 252 F.3d 375, 380 (5th Cir.2001) ("For retaliation claims, this final burden requires the plaintiff to demonstrate that the adverse employment action would not have occurred 'but for' the protected activity."); *Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999)

Consistent with the abovementioned the Circuit Courts are applying the same analytical framework affirmed by this Honorable Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) and the burden shifting of *McDonnell Douglas v. Green*, 411 US 792, 36 L. ED. 2d. 668, 93 S. Ct. 1817 (1973).

Here, the Circuit Court of Appeals for the First Circuit applied the same analysis to the facts presented and determined that Petitioner Claudio-Gotay did not meet the elements to show a prima facie of retaliation when in the course of his duties informed his employer

Becton about his belief of a potential FLSA violation by a subcontractor toward that third party's employees. There is no authority to the contrary and no reason for this Honorable Court to alter the established criteria for a claim under the anti retaliation provision of the Fair Labor Standards Act.

Since the federal claim relating to the discharge was dismissed, the Court of Appeals affirmed the District Court's ruling of declining to exercise supplemental jurisdiction over a state claim for unlawfull discharge.

STATEMENT

On January 19, 2001 Plaintiff- Petitioner Efrain Claudio Gotay, and his parents Efrain Claudio Cruz and Elia M. Gotay Maldonado brought suit under the Fair Labor Standards Act, 29 USC § 201 Et. Seq., the Employee Retirement Income Security Act, 29 USC §1001 Et. Seq. (ERISA) and Public Law No. 80 of May 30, 1976, 29 P.R. Laws Ann. §185a, Et. Seq. claiming that Claudio Gotay was unjustified dismissed from his employment at Becton on January 22, 1999. Plaintiffs alleged that his dismissal was in retaliation for his reporting to his employer Becton about a potential violation to the Fair Labor Standards Act allegedly incurred by CM Express, a subcontractor for security services, toward its employees (the guards).

On the other hand, Respondents alleged that Claudio's dismissal was due to his crass insubordination and for not meeting the company's expectations. Claudio did not engage in a protected activity under FLSA, when during the course of his duties overlooking compliance of the security company with the services contracted, informed his employer about a

possible violation of law by the subcontractor. However, Claudio refused to comply with orders regarding approval of invoices for services already rendered by the subcontractor, even though Becton's management met with him, seek a legal opinion from its attorney with Claudio been present and took preventive measure to alert the subcontractor of a possible violation to the FLSA. Nevertheless, Claudio refused to comply with the approval of the invoices creating a substantial debit from his employer Becton to CM Express, exposing Becton to a breach of contract for lack of payments plus the risk of cancellation of the security services in the manufacturing plant.

The District Court entered judgment dismissing the complaint concluding that Claudio did not meet the first element of a retaliation claim under FLSA since he did not engage in a statutorily protected activity while reporting alleged irregularities of an employer that was not his own and in no way responsible for Claudio's job. The District Court also dismissed the COBRA claimed and declined to exercise supplemental jurisdiction over the state law claims since they were substantially derived from the same operative facts of the federal claims previously dismissed.

The Court of Appeals for the First Circuit affirmed in part and reversed in part the Judgment of the District Court. Specifically, the Court of Appeals affirmed the dismissal of the retaliation claim concluding that Petitioner Claudio did not engage in a statutorily protected activity and did not step outside of his duties representing the company while informing his employer about his beliefs of potential irregularities of the subcontractor with respect to its employees. Claudio was concerned with protecting Becton, not asserting rights adverse to it. The Circuit Court

concluded that Claudio attended a meeting with Becton's management to discuss the issue of the guards' overtime[1]; that Becton's attorney[2] concluded that the guards were not Becton's employees, however as a preventive measure they will send a letter to the subcontractor advising about a possible violation of FLSA; Claudio was directed to approve the invoices for the services rendered by the security guards company. Claudio refused to comply with his duties of approving the invoices. Petition App. 5-7.

The First Circuit also affirmed the dismissal without prejudice of the state claims since it had already dismissed the retaliation claim under FLSA. The dismissal of the Cobra Claim was reversed and returned to the District Court since there was a genuine issue of fact in controversy.

On September 29, 2004 Petitioners filed an Application to extend the time to file a Petition for a writ of Certiorari from October 11, 2004 to October 31, 2004. The application was granted until October 31, 2004. However, none of these documents were served on Respondents, even though Rules 22 and 30 of the Rules of the Supreme Court of the United States require so.

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[1] Petitioners claim in the petition that the Circuit Court of Appeals mix up the factual statement, proceeding to analyze incorrect facts in support of the dismissal of he FLSA claims. That is a misstatement.

[2] Petitioners emphasize that Claudio Gotay is a law school graduate, however at the time of the events he was a student and according to his admissions he did not graduate until more than a year after that. However, the legal education that he had was sufficient to make him aware of the consequences of a breach of contract for lack of payment for services rendered.

PETITIONERS' MISSTATEMENTS OF THE FACTS:

Petitioners misstate some of the facts of the case in the Petition, so we will clarify them for this Honorable Court.

Efrain Claudio was employed by Becton Dickinson on September 28, 1998 as Safety Environmental & Process Engineer. After a month in his job, he was assigned the duties of monitoring the security services that were contracted with CM Express Service Corp. (herein CM Express) and approving the security invoices for payment. Claudio's duties included seeing that the guards were at Becton, that they render the services as the contract specified and approving the invoices for payment.

Neither Claudio nor Becton were the supervisors of CM Express' guards as Petitioners claimed. The security services contract between Becton and CM Express, clearly provided that the security guards were employees of CM Express, which was responsible for recruit, train, uniform, them, equip and supervise the guards which were not Becton's employees. (See Clause 4 of Contract, Appendix 1 of Brief in Opposition). CM Express was solely responsible for the hiring, firing and payment of salary, overtime, payroll taxes to the government of Puerto Rico and the United States of America, income tax, Social Security and unemployment pursuant to applicable State and Federal laws of its personnel, including the security guards as well as any other withholding that is the duty of the employer. (Clause 4 of the Services Contract, App. 1 of Brief in Opposition) Becton was only entitled to substitute any of the security guards, at any time without giving CM

Express any explanation but Becton (and consequently, Claudio) lacked authority to hire or fire any of the security guards. Clause 6 of the Services Contract.

The parties agreed that Becton will pay CM Express $6.65 per hour of service, per guard, for a 24 hour daily period plus twelve daily hours in Building Number 30. (Clause 2 of the Contract, App. 1 of Brief of Opposition) CM Express was to invoice the services biweekly and Becton should pay upon receipt. If payment was in arrears for two or more consecutive bi-weekly periods, CM Express might terminate the contract. Clause 9 of the Services Contract. App. 4 of Brief in Opposition.

During his short employment with Becton, Claudio was admonished for tardiness.

Claudio informed his supervisor about his beliefs of potential irregularities committed by the subcontractor regarding overtime payment to the guards. On January 12, 1999[3], a meeting was held with Becton's managerial employees where Claudio exposed his worries regarding the guards' salaries so they agreed to consult with Becton's attorney. After discussing the situation, reviewing the services contract and the benefit of a legal opinion from Becton's attorney, they agreed on sending a letter to CM Express alerting of possible violations to FLSA, as a preventive measure since the guards were not Becton's employees.

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[3] Petitioners alleged that the meeting occurred in January 18, 1999, however, Plaintiff Claudio stated in his deposition that it took place on January 12, 1999, that he was instructed to approve the invoices and that he did not and later wrote a memo (January 18, 1999) with his suggestions, regardless of the legal advise given because he wanted to put his opinion in writing.

From the invoices submitted by CM Express there was no way to determine if, in fact, a FLSA violation was committed as Claudio claimed. The invoices only provided the hours charged to Becton for services rendered at the rate of the contract, not each guard's work shifts, the guard's salary per hour or what had they been paid[4], and the invoices were submitted to Becton biweekly after the rendering of the services[5].

During that meeting of January 12, 1999, with the benefit of a legal opinion, Claudio was instructed in the meantime to approve the invoices for payment, already in arrears, of the services rendered by CM Express. Almost a week later, on January 18, 1999, Claudio returned the invoices with "not approved" accompanied by a confidential memo stating again his opinion already discussed with Becton's management and attorney, expressing that his interest was "to avoid potential liability of Becton Dickinson before any future reclamation related with it." Claudio never complied with his duties of approving the invoices for processing payment owed to CM Express, in spite of the specific instructions, the legal opinion provided by the attorney and the preventive measures taken by Becton's management to alert CM Express of any potential FLSA violation regarding payment of its employees. Consequently, on January 22, 1999 Claudio was terminated from his employment.

The District Court and the Court of Appeals both concluded that Petitioner Claudio did not engage

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[4] It is extremely logical to presume that a profit corporation will received earnings and will not agree in a contract to a similar or lower rate than the one the provider is paying to its employees.

[5] Becton was not paying the guards' payroll, but the services charged biweekly by CM Express after been rendered.

in a protected activity when he informed his employer about his beliefs of a potential violation to the FLSA by a subcontractor, a different employer, regarding payment of wages to said subcontractor employees. They also concluded that Claudio did not step out of his duties, since he was in charge of overseeing that the security services were provided as contracted, neither took any action against his employer that could trigger the protection of FLSA's provisions but on the contrary, had the intention to protect his employer.

The Court of Appeals reversed the dismissal of the claim under COBRA since there was a genuine issue of material fact regarding whether Claudio was given adequate notice within the time period required by COBRA. Petition's Appendix 9.

REASONS FOR DENYING THE PETITION

The decision of the Circuit Court of Appeals for the First Circuit does not conflict with a decision from any Court of Appeals. The Courts have considered the question of whether an employee who complains about a FLSA violation committed by his employer and refuses to participate in an illegal practice and is later dismissed, is entitled to a cause of action under the FLSA anti retaliation provision of said act. For that purpose the Courts have reviewed the facts presented in light of a standard analytical framework to determine if in fact the employee was asserting any rights under FLSA against his or her employer, thus incurring in a statutorily protected activity that would trigger the anti retaliation provision of the statute. If the employee was not asserting any rights against his or her employer, it has been determined that it did not engage in a statutorily protected activity, then is not

entitled to a claim under the FLSA's anti retaliation provision.

1) There is no Circuit split on the Question Presented

a) The First Circuit Court's ruling is not in contravention of the holdings of other Circuit Courts.

The FLSA anti-retaliation provision, 29 U.S.C. §215(a)(3) states:

> "It shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

In Williamson v. General Dynamics Corp., 208 F.3d 1144 (9th Cir. 2000), the Court held that: "The purpose of the anti-retaliation provision is: 1) to provide an incentive for employees to report wage and hour violations by their employers; 2) to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance; 3) to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act." In addition, the Court of Appeals for the Ninth Circuit held that: "the FLSA anti-retaliation provision protects not only employees who have filed complaints in court or with an agency but also, employees who have complained to their employers."

The Courts have uniformly held that a prima facie case of retaliation under the FLSA requires a showing that: 1) the plaintiff engaged in a statutorily protected activity; 2) his employer thereafter subjected him to an adverse employment action; and 3) as a reprisal for having engaged in the protected activity. *Blackie v. State of Maine*, 75 F.3d 716, 722 (1st Cir. 1996); Conner v. Shnuck Markets, Inc., 121 F3d. 1390, 1394 (10th. Cir. 1997); EEOC v. HBE Corporation, 135 F. 3d. 543, 554 (8th Cir. 1998); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998); *Moyo v. Gomez*, 40 F. 3d. 982, 984 (9th Cir. 1994); *Cordero v. Turabo Medical Center Partnership*, 175 F.Supp. 2d 124, 127 (D.P.R. 2001).

Moreover, the Courts have also ruled that once a prima facie case of retaliation under FLSA is shown, the burden shifting framework of McDonnell Douglas also applies. *Kanida v. Gulf Coast Medical Personnel, LP.*, 363 F.3d 568 (5TH Cir. 2004); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 876-78 (2d Cir.1988); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir.1997); *Rios v. Rossotti*, 252 F.3d 375, 380 (5th Cir.2001); *Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999); *Richmond v. ONEOK*, Inc., 120 F. 3d. 205 (10th Cir. 1997). So, in order to establish a prima facie case, a plaintiff needs to show that he or she engaged in a protected activity. Engaging in a protected activity requires the assertion by the employee of rights under the statute against his employer, whether in an official or unofficial way.

In *McKenzie v. Renberg's, Inc.*, 94 F. 3d. 1478, 1486 (10th Cir. 1996) the Director of Personnel who was responsible for monitoring compliance with state and federal laws, discuss with the President of the company her concerns about some of their employees not been properly compensated for overtime. Sixteen days later

she was dismissed and proceeded to file suit against her former employer asserting a FLSA retaliatory discharge claim and a state law claim for wrongful discharge. The District Court entered judgment in favor of Plaintiff and later granted a Motion for Judgment as a matter of law under Fed. R. Civ. P. 50. Plaintiff appealed.

The Circuit Court of Appeals for the Tenth Circuit apply the criteria for a retaliation claim and determined that "it is the assertion of statutory rights (i.e. the advocacy of rights) by taking some action adverse to the company –whether via formal complaint, providing testimony in an FLSA proceeding, complaining to superiors about inadequate pay, or otherwise, -- that is the hallmark of protected activity under §215 (a) (3)". The court continued stating that "in order to engage in a protected activity the employee must step outside of his or her role of representing the company and either file (or threaten to file) an action adverse to her employer, actively assist other employee in asserting rights or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA". Mckenzie, 94 F. 3d. 1478.

The Court held that McKenzie never crossed the line from being an employee performing her job as personal director to an employee lodging a complaint; she never asserted any rights under FLSA or took an action adverse to her employer, but rather acted consistent with her duties, hence she lacked an essential ingredient of a retaliation claim: she did not engage in a protected activity. *McKenzie v. Renberg's, Inc.*, 94 F. 3d. 1478, 1486-1487 (10th Cir. 1996).

Meanwhile in *Conner v. Schnuck Markets, Inc.*, 121 F. 3d. 1390 (10th Cir. 1997), a food clerk filed suit

against his former employer for retaliatory discharge. He alleged been discharged after claiming to his employer that he was owed overtime wages under FLSA when he submitted a complete survey of the unpaid hours. The District Court dismissed the case after concluding that Conner failed to establish a prima facie case of retaliatory discharge. On appeal, the Circuit Court for the Tenth Circuit again relied on the three elements of the prima facie case and the burden shifting framework of *McDonnell Douglas v. Green*, 411 US 792, 36 L. ED. 2d. 668, 93 S. Ct. 1817 (1973). Once applying the same elements, the Court ruled that Conner's actions, contrary to McKenzie's, supra, involved the unofficial assertion of his rights, since he had no management responsibilities regarding the calculation of overtime wages, and therefore, Conner's request for overtime wages was 'adverse to the company' and was a personal complaint about the wage and hour practice of his employer." (Emphasis added). *Conner, supra*, at 1394. The Court of Appeals affirmed the dismissal because after establishing the prima facie case, Conner failed to provide evidence that the legitimate proffered reason of his employer was pretextual.

Contrary to what petitioners claimed, Mr. Claudio's actions are not similar to Conner's. Petitioner Claudio was not responsible for calculating overtime wages of the security guards employed by CM Express but nobody at Becton was either. Indeed, everyone at Becton lacked the correct information[6] and the

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[6] Even petitioner Claudio lacked the information about the wages since he presumed that if a guard worked overtime, Becton was supposed to pay the guards' employer twice the rate of the contract. As we exposed in the facts, the documents submitted to

authority to do so, since Becton was not the guards' employer. Petitioners mislead this Honorable Court when stating that the invoices reveal that the guards were to be paid at regular pay rate, not overtime rate, despite that some hours were worked over the 40 hours per week time frame.

Nevertheless, Claudio was in charge of overseeing that the contracted security services were rendered and had to verify that the total hours invoiced by CM Express were actually offered. If there was a problem with the services he had to report it as part of his duties. So he did, when he believed that the guards' employer, CM Express, could be incurring in a potential violation to FLSA. He proceeded to inform his employer Becton about his concerns in order to protect the company, as he admitted. Petitioner Claudio never claimed to Becton that it owed him or his co employees any money, never took an adverse action against his employer Becton or complained about the wage and hour practice of his company. Even in *McKenzie, supra*, where as part of her role she was alerting the company about the wages and hour practices and possible irregularities of her own employer, the Court found that she did not engage in a statutorily protected activity because she was not asserting any rights.

Thus, it is clear that Petitioner Claudio never asserted his rights under the FLSA and did not engage in statutorily protected activity when alerted his employer about potential irregularities of a different

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the District and the Circuit Court of Appeals clearly reveal that the invoices submitted by CM Express contained the hours charged for daily services rendered by the company CM Express not, by the individual guards. Becton has no knowledge of the guards' work shifts or the salaries paid to them. (App. 5-8 Brief in Opposition)

employer regarding overtime payment of that third party's employees. Therefore, the Circuit Court of Appeals for the First Circuit held consistently with the other Circuit's rulings and the decision is totally supported by the jurisprudence.

b) Petitioners misstate the jurisprudence regarding refusal to carry out an order or policy

Petitioners assert that the present state of law within the First Circuit Courts of Appeals jurisdiction is "that employer (sic) can put their employees in the unfair position of having to choose to participate in a violation of the Fair Labor Standards Act, or any law for the matter, or be dismissed from employment for his refusal to participate in said activity despite the employee's reasonable belief that he would be participating in said illicit activity if he follows orders". Petition, Page 18. That is another misstatement of the facts and the cited case law.

Petitioners also claimed that relying on *EEOC v. HBE Corp.*, 135 F. 3d 543, 554 (8th Cir. 1998) the First Circuit Court concluded "that as Claudio Gotay's duties included the approval of the invoices, as ordered by his superiors, he did not step outside of his duties when he once and again did not approve them". Petition at page 14. However, a thorough review of the Court's opinion does not sustain that conclusion, but demonstrates that Petitioners are mixing up two different arguments. See, Petition's Appendix 4 and 6. Specifically, the Court of Appeals explained the doctrine of stepping out of duties when discussing the first incident of Claudio informing about his concerns. (Appendix Page 4) Then, at App. 6, the court's addressed as a separate incident Claudio's

refusal to sign the invoices and whether that triggered the protection of FLSA.

In *EEOC v. HBE Corp.*, supra, the Court of Appeals for the Eight Circuit dealt with a claim filed by the EEOC on behalf of two employees that were discharged from employment, one for alleged racial discrimination (the manager) and the second one, the director of personnel, in alleged retaliation for standing up for the first one. The Director of Personnel (Ey) objected and refused to follow orders to dismiss the manager (Helms) since he believed that the decision was racially motivated. Prior to the order for dismissal of the manager, the Director of Personnel had been hearing discriminatory racial remarks from his superiors addressed to Helms, so he refused to comply with the order for dismissal. The District Court entered judgment in favor of Plaintiffs.

On Appeal, the Circuit Court for the Eight Circuit analyzed the facts for the retaliatory discharge claim under the same elements required by the other circuits. The Court discussed when an employer can refuse to comply with an order. It was stated that an "opposition must be based on a reasonable belief that an employer has engaged in a discriminatory conduct, Evans, 65 F. 3d. at 100, and it can include refusal to implement a discriminatory conduct". The Court explained that a "requirement of 'stepping outside' a normal role is satisfied by a showing that the employee took some action against a discriminatory policy, (citations omitted), and that the action was based on a reasonable belief that the employer engaged in a discriminatory conduct". *EEOC*, 135 F. 3d. at 554.

The Court distinguished the facts of this case from the ones in McKenzie, supra, since in the latter the personnel director was alerting about potential

violations that kept her within her role, while in EEOC, the director was refusing to implement a discriminatory policy, when his role was to further company policy, hence he was stepping outside the normal managerial role.

Similarly, in *Foster v. Time Warner Entertainment Company, L.P.*, 250 F. 3d. 1189 (8th Cir. 2001), a supervisor filed suit against her former employer claiming that she was discharged in retaliation for opposing discrimination under ADA. Judgment was entered on behalf of plaintiff and the employer appealed. Again, the Court applied the same criteria for a prima facie retaliation claim. The Court reaffirmed the ruling of *EEOC v. HBE, supra*, about opposing an action based on a reasonable belief that the employer engaged in discriminatory conduct and refusing to implement a discriminatory conduct. Here, the manager not only reasonably believed that the action was a discriminatory policy, but it was in clear violation of the provisions in the company's manual.

None of these cases relates to the facts before this Court. Petitioner Claudio, as part of his duties, had to verify the services charged by CM Express and approve the invoices submitted for the services of the company and not of the individual guards, to proceed with payment in compliance with a valid contract.

Even though, Becton was not the guards' employer and had no information to verify if a violation of FLSA was committed indeed by the subcontractor as Petitioner Claudio believed and informed, it took an affirmative action of seeking legal advice and preventive measures of informing the subcontractor about the concerns of a potential violation of the law. Claudio was aware of the legal opinion since he was in the meeting and heard the attorney's recommendation,

so he knew that his employer was not engaged in any violation of the FLSA. However, as part of the contractual obligations between Becton and CM Express, Becton had to comply with payment of services rendered and charged. So, on January 12, 1999, Becton instructed Petitioner Claudio to comply with his duties of verifying and approving the invoices.

Notwithstanding the clear and valid instructions, the benefit of a legal opinion rendered by the company's attorney, his knowledge that Becton was not responsible for paying overtime to the guards and the agreement of preventive measures to inform the subcontractor, Claudio refused to comply with his duties. Instead of complying, almost a week later, on January 18, 1999, Claudio returned the invoices in arrears, unauthorized, and with a memo restating the concerns already discussed in the meeting.

As a law school student at the time, Claudio was aware of the consequences for Becton of a breach of contract for lack of payment of the services rendered and charged by the security company. Accordingly, with his academic preparation along with the results of the meeting held on January 12, 1999, Claudio knew that Becton's instruction of verifying and approving the invoices for payment in compliance with the contract was a legitimate action. Nonetheless, he decided to disregard it without any reasonable explanation, making his employee liable for breach of contract and at risk of been deprived of security services at anytime.

In a futile attempt to justify Claudio's unreasonable refusal to comply with his employer legitimate instruction, Petitioners again misstate two cases. First, they claimed that according to *Castillo v. Givens*, 704 F. 2d. 181, 188 (5th Cir. 1983) Becton was liable for the overtime that could be owed to the guards

because it was not paying enough to the security company for them to pay overtime to the guards. Accordingly, Claudio refused to approve the invoices for payment by Becton to the subcontractor.

Contrary to Petitioners' argument, the facts in *Castillo v. Givens*, 704 F. 2d. 181, 188 (5th Cir. 1983), are not even close related to petitioners. In Castillo, thirty-nine migrant farm laborers filed suit under FLSA for unpaid minimum wages and under the Farm Labor Contractor Registration Act for liquidated damages. Defendant, the owner of a farm, employed a farm labor contractor to furnish him with a crew of field workers to chop cotton, however the "contractor" was not in business by himself, did not meet any of the criteria for an independent contractor and was in fact defendant's employee. Moreover, Defendant provided his "contractor" the exact money for payment of the employees according to the number of workers multiplied by the number of hours worked times $1.65 an hour. The 'contractor' was not capable of paying the minimum wage neither of doing business elsewhere. Thus, the Circuit Court determined that the "contractor" was not an independent contractor but the contact for bringing the employees to the farm, so the field workers were deem employees of the owner.

In the second case cited by petitioners, *Faulkner v. United Techs. Corp.*, 240 Conn. 576 at 784 (Conn. 1997), they claimed that "an employee should not be put to electing whether to risk sanctions (for implementing directives by his employer) or to jeopardize his employment". In that case, plaintiff filed suit against his former employer for wrongful discharge for refusing to participate in a scheme to defraud the United States government, which violated the Major Frauds Act. Plaintiff's job involved the inspection of helicopter parts

provided by suppliers to ensure the parts met the engineering's specifications, including parts to be used in constructing Army's helicopters. Plaintiff rejected defective parts provided by suppliers, then reported the existence of the defective parts to his superiors, who instead warned him that he might be disciplined for rejecting parts he deemed defective. So, some of the alleged defective parts were used in the construction of various helicopters. Later, Plaintiff was dismissed. The Superior Court granted defendant's motion to strike due to defective pleadings. The Supreme Court of Connecticut while reviewing the pleadings, stated that an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment. Faulkner, 240 F. Supp. at 583. Specifically, the court concluded that the Plaintiff held a position requiring him to ensure the quality of the employer's products. If he had followed his superior orders and had approved the use of defective parts, he might have exposed himself to criminal sanctions.

Contrary to this case, Becton's instructions to Claudio were valid, legal and compliance with them, specially after all the discussion and the preventive measures taken, did not expose him to sanctions. On the contrary, disregard of the instructions and failure to approve and proceed with payment of the invoices placing Becton in a breach of contract was an illegal action. Once informed of the legal conclusion that Becton was not incurring in any wrong doing or violation of the law and that preventive measures were taken anyhow, Claudio had no reason to refuse to comply with his duties and exposed his employer to liability for lack of payment for services rendered upon a valid contract.

In view of the above discussed case law, it is clear that the ruling of the Circuit Court of Appeals for the First Circuit affirming the dismissal of Claudio's retaliatory discharge claim for not engaging in a statutorily protected activity under FLSA, is consistent with the rulings and decisions of the other Circuit Courts. The analytical framework relied upon by the First Circuit is uniformly applied in other Circuits, and is adopted from the criteria established by this Honorable Supreme Court for retaliation claims under other statutes, such as Title VII.

2) The Court of Appeals did not abuse its discretion to affirm the District Court's decision to decline the exercise of supplemental jurisdiction

Petitioner invokes supplemental jurisdiction for his claims under Puerto Rico Law 80 of May 30, 1976, 29 L.P.R.A. § 185a *et seq.*("Law 80").

28 USCA § 1367 provides that:

Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over **all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy** under Article III of the United States Constitution. Such

> supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. (Emphasis added)

Pendent jurisdiction in federal courts is doctrine of discretion, not of plaintiff's right; it justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them . . ..' *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130,1139 (1966); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585; 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999); (citing *Moor v. County of Alameda*, 411 U.S. 693, 715-716, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Tomaiolo v. Mallinoff*, 281 F.3d 1(1ST. Cir. 2002); *See Vera-Lozano v. International Broad.*, 50 F.3d 67, 70 (1st Cir.1995). A federal court may exercise supplemental jurisdiction over a state claim whenever it is joined with a federal claim and the two claims "derive from a common nucleus of operative fact" and the relationship plaintiff "would ordinarily be expected to try them both in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) *Moor v. Alameda County*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998)

The decision to whether or not exercise supplemental jurisdiction depends on a host of factors--including (1) circumstances of particular case, (2) nature of state law claims, (3) character of governing state law, and (4) relationship between state and federal claims--Federal District Courts may properly decline to

exercise jurisdiction over supplemental state law claims pursuant to 28 USCS § 1367(c), which provision reflects understanding that federal court, when deciding whether to exercise supplemental jurisdiction, should consider and weigh in each case, and at every stage of litigation, values of judicial economy, convenience, fairness, and comity. See *City of Chicago v International College of Surgeons, 522 US 156 (1997).* The standard for review for supplemental jurisdiction determinations is abuse of discretion, *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 200 (1st Cir.2000)

In *Rodriguez v Doral Mortgage Corporation*, 57 F3d 1168, 1177 (1st Circuit 1995), the Court ruled that:

> As a general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims. *See, e.g., Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139 ("[I]f the federal claims are dismissed before trial, ... the state claims should be dismissed as well."); *Martinez v. Colon*, 54 F.3d 980, 990 (1st Cir.1995) (affirming the dismissal without prejudice of pendent claims when the district court determined "far in advance of trial that no legitimate federal question existed"). But this praxis is not compelled by a lack of judicial power. It signifies only that, "in the usual case in which all federal law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine--judicial economy, convenience, fairness, and comity--will point toward declining

to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ.*, 484 U.S. at 350 n. 7, 108 S.Ct. at 619 n. 7. Recently confirmed on *Gonzalez- De Blasini v Family Department*, 377 F3d 81 (1st Cir. 2004)

In *Serrano-Moran v. Grau-Gaztambide*, 195 F.3d 68 (1st. Cir. 1999), the District Court declined to exercise supplemental jurisdiction and dismissed the state claims after finding that those claims did not share a common nucleus of operative facts with the original claims, and the facts relevant to the federal civil claim were entirely separate from the facts relevant to the supplemental claim. The Circuit Court of Appeals confirmed that the lower court did not abuse its discretion when declining supplemental jurisdiction since the facts and witnesses as to the two sets of claims were essentially different, not common.

A similar situation occurs with the case at bar: the federal claim remanded to the District Court refers to whether or not Claudio received adequate notice of his COBRA rights within the time frame provided by the statute. Certainly the federal claim under COBRA and the state claim for wrongful termination are two separate and independent claims that will require different evidence and witnesses for each. As a result, the Court of Appeals did not err when affirmed the district court decision for declining supplemental jurisdiction. The record is void of any evidence suggesting that the District Court abused its discretion, so the alleged error was not incurred.

CONCLUSION

The statutes and the case law of this Honorable Court and the Court of Appeals, not only show that there is no split among the Circuit Courts regarding the issues raised by Petitioners, but also demonstrate that the ruling made by the Circuit Court of Appeals for the First Circuit, in the case of Efrain Claudio v. Becton Dickinson Caribe, is consistent with the applicable law. As such, there are no elements present to move this Court to grant Certiorari to review a ruling in accordance with the law and the petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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December 2004

CERTIFIED TRANSLATION:

SECURITY GUARD CONTRACT

APPEARANCES

FOR THE FIRST PARTY: CM EXPRESS SERVICE CORP., a corporation created pursuant to the laws of Puerto Rico, hereinafter designated as "THE COMPANY".
FOR THE SECOND PARTY: BECTON DICKINSON CARIBE LTD., duly registered and authorized to do business in Puerto Rico, hereinafter designated as "THE CLIENT".

STATE AND AGREE

FIRST: During the life of this contract "THE CLIENT" will use Security Guard Services at the entrance to, as well as at the fenced in premises of Becton Dickinson Caribe LTD, Juncos, Puerto Rico.
SECOND: THE CLIENT agrees to pay the amount of $6.65 per hour, per guard, for a 24 hour daily period; in addition to twelve hours daily in building 30.
The number of daily services may be reduced or increased at the option of "THE CLIENT" with prior written notice to "THE COMPANY." The price agreed to in this contract may be renegotiated by the parties in the event of an increase in the minimum daily wage that affects the salary paid to the Security Guards. The new hourly wage must be acceptable to both parties, in the event that they are not able to reach an agreement, either parties may terminate the instant contract, with a ninety day prior written notice to the other party.

THIRD: The Security personnel to be provided to the client must be duly uniformed.

FOURTH: The Guards shall render the services as required by the Client, but it is agreed that said Guards shall be employees of "THE COMPANY" and not of the client. It will be the obligation of "THE COMPANY" as employer, to recruit the personnel, train them, uniform them, equip them and supervise them. It will also be the obligation of "THE COMPANY" to pay all of the payroll taxes in effect by the Government of Puerto Rico, and the United States of America, income tax, the premium payments for the State Insurance Fund, Social Security, Unemployment, the guards' salaries, the overtime, and any other withholdings that is considered to be the duty of the employer to pay pursuant any State or Federal Law. "THE COMPANY" likewise hereby accepts and understands that neither it, nor any of its employees are "THE CLIENT'S" employees, and that they are therefore not entitled to vacation leave, sick leave, medical plan, Christmas Bonus, nor to any of the other benefits to which "THE CLIENT'S" employees are entitled.

FIFTH: The duties of the Security Guards shall be to provide surveillance and security in the boundary of the fenced in area, the client's premises and plants, control the entry and exit of visitors, always subject to the general orders that are set by "THE CLIENT" for said purposes.

SIXTH: "THE CLIENT" will be entitled to substitute the Security Guards, at any time, without the need to tender any explanation or reason to "THE COMPANY".

SEVENTH: THE COMPANY" will be fully liable for any damages that may be caused by the Security Guards during the performance of their duties. For

these purposes "THE COMPANY" shall maintain public liability insurance policies in the event of bodily injuries, accidental deaths, claims for false arrests, libel, slander, wrongful persecution, etc.

Except for when the loss, damages, liability, Torts or expense is attributable to, or results from negligence on the part of the "THE CLIENT", its agents, and/or employees, "THE COMPANY' shall indemnify, and shall hold harmless "THE CLIENT" for any loss, damages, liability, Torts, or expense claimed or incurred in favor of any person or entity, that may arise or be claimed against "THE CLIENT" , which is attributable to, or stems from the use or occupation of the premise of "THE COMPANY", or from any act, negligence, omission, carelessness or fault incurred by "THE COMPANY", its agents, servants, employees, concessionaires, clients or guests; or due to non compliance on the part of "THE COMPANY" with the applicable laws, ordinances, rules, regulations or statutes. This indemnity must include, but is not limited to Judgments, fines and/or settlement amounts, in addition to Attorney's Fees presently incurred by "THE CLIENT", costs incurred (in Court and out of Court), expert witnesses, Court of Appeals, administration hearings and appeals.

Except for when the loss, liability, Torts or expense is attributable to, or results from negligence on the part of "THE CLIENT", its agents, and/or employees, "THE CLIENT" shall not be liable to "THE COMPANY" for damages, loss, liability, Torts, or expense whatsoever caused to any person, entity or property of "THE COMPANY", or claim by anyone or entity that may stem from the actions, omissions, negligence, faults or carelessness of "THE COMPANY", its agents, servants, employees,

concessionaire, clients or guests or due to "THE COMPANY" shall indemnify and/or maintain "THE CLIENT" indemnified and /or held harmless from any claim or risk as is afore stated in this clause. If "THE CLIENT" is brought into or served with process as a party in any type of litigation or claim initiated against "THE COMPANY", the latter shall protect, defend and hold "THE CLIENT" harmless and shall pay all of the expenses, costs, and Attorney's Fees incurred by "THE CLIENT" related to the proceeding.

EIGHTH: "THE COMPANY" or independent contractor agrees to keep its professional licenses and credentials up to date.

NINTH: The services of "THE COMPANY" shall be invoiced bi-weekly and paid by "THE CLIENT" upon receipt of said invoice. "THE COMPANY" many terminate this contract if the payment of the invoice is in arrears for a period of two or more consecutive bi-weekly periods.

TENTH: The instant contract shall be in effect for a period one (1) year, during said period the parties are bound by all of that is set forth herein.

The contracting parties acknowledge and admit that this contract constitutes the extent of the agreement existing between them and that there does not exist any other agreement, be it verbal or written, with regard to the services that "THE COMPANY" sells to "THE CLIENT."

In Juncos, Puerto Rico on this 1st day of October, 1999.[1]

BECTON DICKINSON CARIBE LTD.
/S/ GREGORIO MATOS COLON
CM EXPRESS SERVICES CORP
GREGORIO MATOS COLON

FOOTNOTE

[1]Translator's Note: 1999 appears crossed out. Written in its stead is "1998" along with two sets of initials. There also appear two sets of initials in the left margin of each page.

CERTIFIED TRANSLATION:

CM Express Service Corp.
Security Patrol Services
13 Narciso Font, Corner of Munoz Riviera, Carolina, P.R. 00985
P.O. Box 7322, Carolina, P.R. 00986 – Tel. 768-4215

BECTON DICKINSON CARIBE, LTD.
INVOICE NO. 3
SECURITY PATROL PARKING
DATE OCT. 31, 1998
JUNCOS, P. R.

DATE	A.M.	P.M.	A.M.	P.M.	TOTAL
F 10-16-98		8: 00	6: 00		10
M 10-19-98		8: 00	6: 00		10
T 10-20-98		8: 00	6: 00		10
W 10-21-98		8: 00	6: 00		10
TH10-22-98		8: 00	6: 00		10
F 10-23-98		8: 00	6: 00		10
M 10-26-98		8: 00	6: 00		10
T 10-27-98		8: 00	6: 00		10
W 10-28-98		8: 00	6: 00		10
TH10-29-98		8: 00	6: 00		10
F 10-30-98		8: 00	6: 00		10
					110 HRS

110 HRS. AT THE RATE OF $6.65----------$731.50

[Translator's note: There appear (3) stamps on the lower part of this page with miscellaneous annotations in English.]

CERTIFIED TRANSLATION:

CM Express Service Corp.
Security Patrol Services
13 Narciso Font, Corner of Munoz Riviera, Carolina, P.R. 00985
P.O. Box 7322, Carolina, P.R. 00986 – Tel. 768-4215

BECTON DICKINSON CARIBE, LTD.
INVOICE NO. 4
SECURITY PATROL PARKING
DATE NOV. 15, 1998
JUNCOS, P. R.

DATE	A.M.	P.M.	A.M.	P.M.	TOTAL
M11-02-98		8: 00	6: 00		10
T 11-03-98		8: 00	6: 00		10
W11-04-98		8: 00	6: 00		10
TH11-05-98		8: 00	6: 00		10
F 11-06-98		8: 00	6: 00		10
M 11-09-98		8: 00	6: 00		10
T 11-10-98		8: 00	6: 00		10
W 11-11-98		8: 00	6: 00		10
TH11-12-98		8: 00	6: 00		10
F 11-13-98		8: 00	6: 00		10
					100 HRS

100 HRS AT THE RATE OF $6.65----------$665.00

[Translator's note: There appear (3) stamps on the lower part of this page with miscellaneous annotations in English.]

CERTIFIED TRANSLATION:

CM Express Service Corp.
Security Patrol Services
13 Narciso Font, Corner of Munoz Riviera, Carolina, P.R. 00985
P.O. Box 7322, Carolina, P.R. 00986 – Tel. 768-4215

BECTON DICKINSON CARIBE, LTD.
INVOICE NO. 7
SECURITY PATROL BUILDING LA 30
DATE NOV. 16 1998
JUNCOS, P. R.

DATE	A.M.	P.M.	A.M.	P.M.	TOTAL
M 11-16-98		6: 00	6: 00		12
T 11-17-98		6: 00	6: 00		12
W 11-18-98		6: 00	6: 00		12
TH11-19-98		6: 00	6: 00		12
F 11-20-98		6: 00	6: 00		12
S 11-21-98	6: 00		6: 00		24
SU11-22-98	6: 00		6: 00		24
M 11-23-98		6: 00	6: 00		12
T 11-24-98		6: 00	6: 00		12
W11-25-98		6: 00	6: 00		12
TH11-26-98		6: 00	6: 00		12
F 11-27-98		6: 00	6: 00		12
S 11-28-98	6: 00		6: 00		24
SU11-29-98	6: 00		6: 00		24
M 11-30-98		6: 00	6: 00		12

240
HRS[1]

240[2] HOURS AT THE RATE OF $6.65---------$1.596.00[3]

[Translator's note: There appear (3) stamps on the lower part of this page with miscellaneous annotations in English.]

[1]Is crossed out, in its stead 228 hrs. appears.
[2]Ibidem.
[3]There appears: "NO. 228 hrs. at the rate of $6.65 = $1,516.20."

CERTIFIED TRANSLATION:

CM Express Service Corp.
Security Patrol Services
13 Narciso Font, Corner of Munoz Riviera, Carolina, P.R. 00985
P.O. Box 7322, Carolina, P.R. 00986 – Tel. 768-4215

BECTON DICKINSON CARIBE, LTD.
INVOICE NO. 8
SECURITY PATROL LA 30
DATE DEC. 15 1998
JUNCOS, P. R.

DATE	A.M.	P.M.	A.M.	P.M.	TOTAL
T 12-01-98		6: 00	6: 00		12
W12-02-98		6: 00	6: 00		12
TH12-03-98		6: 00	6: 00		12
F 12-04-98		6: 00	6: 00		12
S 12-05-98		6: 00	6: 00		12
SU12-06-98	6: 00		6: 00		24
M 12-07-98	6: 00		6: 00		24
T 12-08-98		6: 00	6: 00		12
W 12-09-98		6: 00	6: 00		12
TH12-10-98		6: 00	6: 00		12
F 12-11-98		6: 00	6: 00		12
S 12-12-98		6: 00	6: 00		12
SU12-13-98	6: 00		6: 00		24
M12-14-98	6: 00		6: 00		24
T 12-15-98		6: 00	6: 00		12
					228 HRS.

228 HOURS AT THE RATE OF $6.65---------$1,516.20

[Translator's note: There appear (3) stamps on the lower part of this page with miscellaneous annotations in English.]